TEXAS REGISTER

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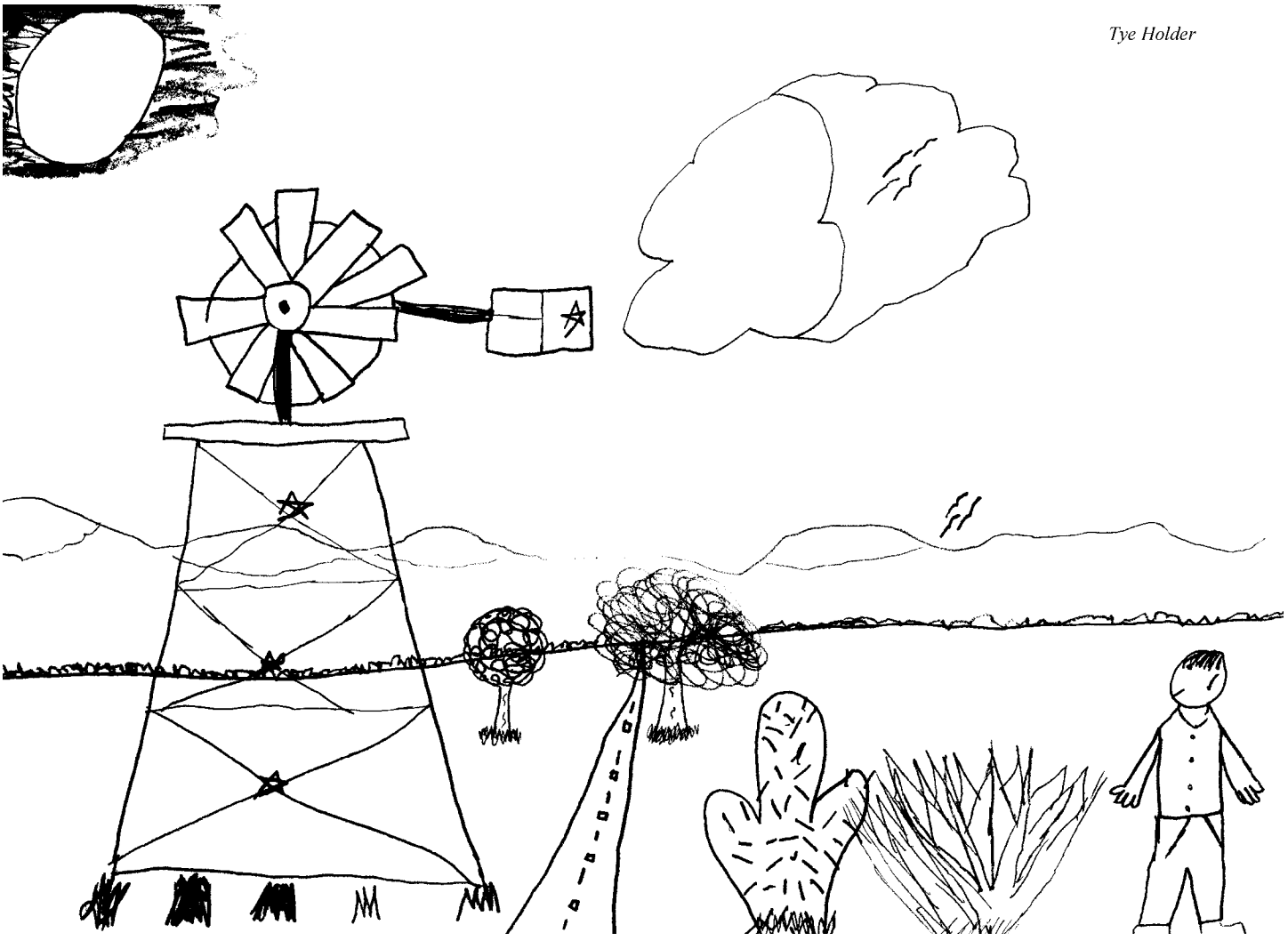

Tye Holder

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN ADDITION

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for September 2, 2008

Appointed as Border Commerce Coordinator for a term at the pleasure of the Governor, Esperanza (Hope) Andrade of Boerne (replacing S. Philip Wilson of Austin who no longer qualifies).

Appointed to the Family Practice Residency Advisory Committee for a term to expire August 29, 2011, Joe M. Deason of Lufkin (Mr. Deason is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Robert W. Pearson of Austin (Mr. Pearson is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Jose Riojas of El Paso (Mr. Riojas is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Enrique Venta of Beaumont (Dr. Venta is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Aruna Viswanathan of Houston (Ms. Viswanathan is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Judy Hawley of Portland (Ms. Hawley is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Brett Gilbert of College Station (Dr. Gilbert is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Rick Ledesma of Harlingen (replacing Cesar Maldonado of Harlingen whose term expired).

Appointed to the Texas Emerging Technology Advisory Committee, effective September 1, 2008, for a term to expire August 31, 2010, Mauli Agrawal of San Antonio (replacing David Spencer of San Antonio whose term expired).

Appointments for September 4, 2008

Appointed to the State Seed and Plant Board for a term to expire October 6, 2008, James Wahrmund of Fredericksburg (replacing Katherine Patrick of Bishop who resigned).

Appointed to the Texas Radiation Advisory Board for a term to expire April 16, 2013, Jesse Ray Adams of Longview (replacing Michael Walsh of San Antonio whose term expired).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2010, Joe Campos of Dallas (Mr. Campos is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2010, Fred Wilson, Jr. of Lubbock (Mr. Wilson is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2010, Randall Childers of Waco (Mr. Childers is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2010, Mark Remmert of Liberty Hill (replacing Craig Farmer of Lubbock who resigned).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2010, Ann Dempsey of Austin (replacing Rudy Gomez of Brownsville whose term expired.

Appointments for September 8, 2008

Appointed to the Texas Medical Board for a term to expire April 13, 2011, George Willeford, III of Austin (replacing Larry Anderson of Tyler who resigned).

Appointed to the Office of Rural Community Affairs for a term to expire February 1, 2009, Charles W. Graham of Elgin.

Appointments for September 9, 2008

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2009, Severita Sanchez of Laredo (Ms. Sanchez is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2009, Ruben Reyes of Lubbock (replacing Marilea Lewis of Dallas whose term expired).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2009, James Pendell of Fabens (Mr. Pendell is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2009, Lucy Rubio of Corpus Christi (Ms. Rubio is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2009, Dawn DuBose of Houston (replacing Vivian King of Houston whose term expired.

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2010, Carl Montoya of Brownsville (Dr. Montoya is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2010, Eric Cederstrom of Palo Pinto (Mr. Cederstrom is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2010, Daniel Griffith, II of Pflugerville (Mr. Griffith is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2010, Garry Eoff of Brownwood (Mr. Eoff is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2010, Jane Wetzel of Dallas (Mr. Wetzel is being reappointed).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, MariBen Ramsey of Austin (replacing Cynthia Benson of Midland whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Elizabeth Fitzgerald of Austin (replacing Tara Olens of Austin whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Robert Kelly of Kerrville (replacing Carolyn Young of Austin whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Edie Muehlberger of Austin (replacing Traci Wickett of Brownsville whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Donna Brosh of San Angelo (replacing Peter Mastrangelo of Corpus Christi whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Traci Wickett of Brownsville (replacing Kristin Alexander of Dallas whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Patrick Chavez of El Paso (Mr. Chavez is being reappointed).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2010, Aaron Montemayor of Nacogdoches (Mr. Montemayor is being reappointed).

Appointed to the Texas State University System Board of Regents for a term to expire February 1, 2011, Donna Williams of Arlington (replacing Don Flores of El Paso whose term expired).

Rick Perry, Governor

TRD-200804922

♦ ♦ ♦

Proclamation 41-3158

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that Hurricane Gustav poses a threat of imminent disaster along the Texas Coast and in the counties of Angelina, Aransas, Austin, Bee, Bexar, Bowie, Brazoria, Brazos, Brooks, Calhoun, Cameron, Chambers, Collin, Colorado, Dallas, Denton, DeWitt, El Paso, Fort Bend, Galveston, Goliad, Hardin, Harris, Hidalgo, Jackson, Jasper, Jefferson, Jim Hogg, Jim Wells, Kenedy, Kleberg, Lavaca, Liberty, Lubbock, Matagorda, Montgomery, Nacogdoches, Navarro, Newton, Nueces, Orange, Polk, Potter, Refugio, Sabine, San Jacinto, San Patricio, Shelby, Smith, Starr, Tarrant, Tom Green, Travis, Trinity, Tyler, Victoria, Waller, Walker, Webb, Wharton and Willacy beginning August 27, 2008.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster based on the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat.

As provided in Section 418.016, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 28th day of August, 2008.

Rick Perry, Governor

Attested by: Coby Shorter, III, Deputy Secretary of State

TRD-200804920

♦ ♦ ♦

Proclamation 41-3159

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that Hurricane Ike poses a threat of imminent disaster along the Texas Coast and in the counties of Anderson, Angelina, Aransas, Archer, Austin, Bee, Bell, Bexar, Bowie, Brazoria, Brazos, Brooks, Calhoun, Cameron, Cass, Chambers, Cherokee, Collin, Colorado, Comal, Dallas, Denton, DeWitt, Ellis, El Paso, Fort Bend, Franklin, Galveston, Goliad, Grayson, Gregg, Hardin, Harris, Harrison, Henderson, Hidalgo, Hill, Hopkins, Hunt, Jackson, Jasper, Jefferson, Jim Hogg, Jim Wells, Kaufman, Kenedy, Kleberg, Lamar, Lavaca, Liberty, Lubbock, Matagorda, McLennan, Montgomery, Nacogdoches, Navarro, Newton, Nueces, Orange, Panola, Parker, Polk, Potter, Randall, Refugio, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Starr, Tarrant, Titus, Tom Green, Travis, Trinity, Tyler, Van Zandt, Victoria, Waller, Walker, Webb, Wharton, Willacy, Williamson, Wise and Wood beginning September 7, 2008 and continuing.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster based on the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat.

As provided in Section 418.016, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 8th day of September, 2008.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200804921

♦ ♦ ♦

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0736-GA

Requestor:

The Honorable Leo Berman

Chair, Committee on Elections

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Consequences attending a legislator's announcement of his candidacy for governor during the first year of a two-year term (RQ-0736-GA)

Briefs requested by October 6, 2008

RQ-0737-GA

Requestor:

The Honorable Warren Chisum

Chair, Committee on Appropriations

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether the Edwards Aquifer Authority may prohibit the granting of permits to certain recharge facilities; and whether the Authority may prohibit itself from contracting with certain recharge facilities (RQ-0737-GA)

Briefs requested by October 6, 2008

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200804896
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 9, 2008

♦ ♦ ♦

Opinions

Opinion No. GA-0659

The Honorable R. Lowell Thompson

Navarro County Criminal District Attorney

Navarro County Courthouse

300 West Third Avenue, Suite 203

Corsicana, Texas 75110

Re: Legal status of a portion of a road originally built as an Ellis County road but which a later survey established as located in Navarro County (RQ-0682-GA)

S U M M A R Y

An order of the Navarro County Commissioners Court adopting a resurvey report does not establish as a matter of law that a portion of a road previously thought to be located in Ellis County but actually located in Navarro County is a Navarro County road.

Opinion No. GA-0660

The Honorable Jeri Yenne

Brazoria County Criminal District Attorney

111 East Locust, Suite 408A

Angleton, Texas 77515

Re: Whether a municipal court may hear compliance applications filed under section 822.042(c) of the Health and Safety Code and appeals of dangerous-dog determinations under section 822.0421(b) of the same code (RQ-0685-GA)

S U M M A R Y

A municipal court established under Government Code chapter 29 has jurisdiction under Health and Safety Code section 822.042(c) over a compliance application filed under that section if the court also has territorial and personal jurisdiction. Such a municipal court also has jurisdiction under Health and Safety Code section 822.0421(b) over an appeal of a municipal animal control authority's dangerous-dog determination made under section 822.0421(a) if the court also has territorial jurisdiction. The phrase "court of competent jurisdiction" in section 822.0421(b) refers to a court with territorial jurisdiction over the matter.

A municipal court may not, on the grounds of a lack of subject-matter jurisdiction, refuse to hear an appeal of a dangerous-dog determination by a municipal animal control authority if the court has territorial jurisdiction. The court may, however, determine that it does not have territorial jurisdiction. A dog owner may file an appeal of a munici-

pal animal control authority's dangerous-dog determination with any municipal court, justice court, or county court--all of which have jurisdiction under section 822.042(c)--that also has territorial jurisdiction. A municipal court may not transfer a dangerous-dog-determination to a county or justice court and is obligated to hear the appeal. A municipality may not, by order of its animal control authority or otherwise, dictate the court to which a dog owner may appeal a dangerous-dog determination if more than one court has subject-matter, including territorial, jurisdiction.

Opinion No. GA-0661

The Honorable Russell W. Malm

Midland County Attorney

200 West Wall Street, Suite 104

Midland, Texas 79701

Re: Whether a county is authorized to pay a performance-based bonus to elected officials (RQ-0686-GA)

S U M M A R Y

A bonus plan that is premised on accomplished performance goals set by a commissioners court may improperly interfere with an elected official's constitutionally based sphere of authority. Thus, we cannot advise that a commissioners court is authorized to adopt such a plan.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200804895

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: September 9, 2008

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 34. PUBLIC FINANCE

PART 9. TEXAS BOND REVIEW BOARD

CHAPTER 190. ALLOCATION OF STATE'S LIMIT ON CERTAIN PRIVATE ACTIVITY BONDS

SUBCHAPTER A. PROGRAM RULES

34 TAC §190.9

The Texas Bond Review Board (Board) adopts new §190.9, concerning Temporary Increase in Volume Cap as an emergency rule pursuant to Texas Government Code, §2001.034. The Board finds that it is not practicable to provide prior notice or hearing of the rule because an imminent peril to the public welfare and the requirements of federal law require adoption of the rule without prior notice or hearing.

The Board is charged by the legislature with the responsibility of administering the "state ceiling" allocated each year under federal law to the states for issuance of tax-exempt private activity bonds. Texas Government Code, Chapter 1372. Chapter 1372 of the Texas Government Code provides a framework under which eligible issuers are entitled to apply for reservation of the state ceiling beginning in early October of the prior calendar year. Texas Government Code, §1372.028. Designated percentages of the state ceiling are set aside for issuances of qualified mortgage bonds, state-voted bonds, qualified small issue bonds and enterprise zone facility bonds, qualified residential rental project bonds, qualified student loan bonds and other bonds requiring allocation until August 15 when applications for reservations of the remaining state ceiling may be submitted by any eligible issuer. Texas Government Code, §1372.022. The application deadline is December 1. Texas Government Code, §1372.035. This framework is intended to provide an orderly system to ensure that all types of eligible issuers have opportunity to take advantage of cheaper tax-exempt financing.

The federal government recently enacted legislation, the Housing and Economic Recovery Act of 2008 (Act), that became effective on July 30, 2008. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (effective July 30, 2008). Section 3021 of the Act increases the state ceiling for tax-exempt financing during calendar year 2008 with the requirement that the increase "shall be allocated solely for one or more qualified housing issues." The Board's staff has calculated the Act's additional state ceiling allocation to the State of Texas to be approximately $770 million. As a result of the passage of the Act, which occurred more than half way through calendar year 2008 and the limited scope of Section 3021 which applies only for the calendar year 2008, it is necessary for the Board to act as quickly as possible to implement procedures that will enable issuers of "qualified housing issues" to apply for a reservation of the additional state ceiling through the end of the year (rather than being cut off by December 1) and to be able to submit a more general form of application than submitted for the existing state ceiling, with certain information entitled to be determined at a later date and furnished to the Board's staff with a supplemental filing. Unless this additional flexibility is provided to issuers of qualified housing issues by the rule, the Board is concerned that such issuers, otherwise restricted by the December 1 application deadline and the more restrictive application requirements in Chapter 1372, will not be able to utilize the additional state ceiling authorized by the Act.

Because §3021 of the Act requires that the additional state ceiling "shall be allocated solely for one or more qualified housing issues" and the existing framework for Chapter 1372 does not contemplate a federal increase of state ceiling for a specific category of bond issues late in the program year, the adoption of an emergency rule is required to effectuate the federal Act and facilitate the expeditious allocation of the increased state ceiling.

Section 3021 of the Act, along with authorizing qualified mortgage bonds and qualified residential rental bonds to be issued using the additional state ceiling, authorizes the ceiling to be used for qualified mortgage bonds issued to refinance "qualified subprime loans." Testimony by legislators preceding the passage of the Act evidences that Congress considers subprime mortgage loans to be an imminent threat to the public welfare, particularly the communities and neighborhoods in which the loans are prevalent. For example, in support of the Act, U.S. Representative Betty McCollum of Minnesota remarked:

"Foreclosures hurt our families, neighborhoods, and communities. . . Foreclosures result in lost tax revenue for local governments, reduced property values for neighbors, and can often contribute to criminal activity. Congress must act to protect families and neighborhoods from a further expansion of this crisis, which is why I strongly support H.R. 3221. This legislation is a comprehensive response that will help families facing foreclosure keep their homes, help other families avoid foreclosures in the future, and help communities harmed by empty homes in the foreclosure process."

Congressional Record, Housing and Economic Recovery Act of 2008--(Extensions of Remarks--July 25, 2008), E1564, Speech of Hon. Betty McCollum of Minnesota in the House of Representatives, Wednesday, July 23, 2008. The imminent threat to public welfare posed by the housing crisis requires that the Board implement an emergency rule to give qualified housing issuers direction as soon as possible about the application process and period for the increased state ceiling so that the allocation meant to address the housing crisis is not lost for failure to allocate it in an expeditious manner.

The rule is adopted, on an emergency basis, under Texas Government Code, §1372.004 and §2001.004. The Board interprets §1372.004 to authorize it to adopt the rule because the Act adds the additional state ceiling to the existing state ceiling governed by Chapter 1372. The Board interprets §2001.004 to authorize it to adopt the rule as a rule of practice for administering the additional state ceiling provided by the Act.

No other statutes, articles or codes are affected by the emergency rule.

As an emergency rule, the rule is effective on September 3, 2008 and will remain in effect for 120 days, subject to the Board's right to renew the rule once for an additional period not exceeding 60 days. Texas Government Code, §2001.034 and §2001.036.

§190.9. Housing and Economic Recovery Act of 2008 Temporary Increases in Volume Cap.

(a) Pursuant to the authority granted by the Administrative Procedure Act, Chapter 2001, Government Code and Chapter 1372, Government Code, the Bond Review Board prescribes the following sections regarding practice and procedure in the allocation administration of the authority in the State of Texas to issue private activity bonds with respect to Section 3021 of HERA, the Temporary Liberalization of Tax-Exempt Housing Bond Rules.

(b) Definitions of terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) "HERA" means the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

(2) "Emergency Housing Volume Cap" means volume cap created under HERA.

(3) "Standard Volume Cap" means normal volume cap granted to states for purposes described in Section 146 of the Internal Revenue Code and administered by Government Code, Chapter 1372.

(4) "Standard State Ceiling" means the common amount of volume cap allocated to a sub-ceiling from the Standard Volume Cap.

(5) "Qualified housing bond" means bonds issued for the purpose as stated in Section 3021(B)(ii) of HERA. Specifically:

(A) an issue described in Section 142(a)(7) of the Internal Revenue Code relating to qualified residential rental projects; or

(B) a qualified mortgage issue (determined by substituting '12-month period' for '42-month period' each place it appears in Section 143(a)(2)(D)(i) of the Internal Revenue Code).

(6) "Total emergency volume cap" means amount of volume cap increase under Section 3021(a)(1) of HERA.

(c) All requests for Emergency Housing Volume Cap shall be considered on a first come-first serve basis based on the time of receipt of an application by the Board.

(d) Application Filing. The issuer shall submit one original and one copy of the application for reservation. Each application must be accompanied by the following:

(1) the application fee;

(2) the certificate regarding fees, on the form prescribed by the Board;

(3) a copy of the inducement resolution or other similar official action taken by the issuer with respect to the bonds and the project which are the subject of the application, certified by an officer of the issuer; or a copy of the certified resolution of the issuer authorizing the filing of the application for reservation, in either case certified with an original signature by an officer of the issuer. A project may be identified as "to be determined" but must specify whether it is a qualified mortgage issue or a qualified residential project issue;

(4) a copy of the issuer's articles of incorporation as certified by the Secretary of State of Texas and by-laws, including amendments thereto and restatements thereof, or alternatively, a certification with an original signature by an authorized representative of the issuer that there have been no amendments to the articles of incorporation or by-laws since the last submission of these items to the Board;

(5) a copy of the issuer's certificate of continued existence from the secretary of state of Texas dated within 30 days of submission of application, an issuer's certificate of good standing is not an acceptable substitution for this requirement;

(6) if known at the time of the application a copy of the borrower's and, if the borrower is a partnership, each partner's certificate of good standing from the Comptroller of Public Accounts of Texas, dated within 30 days of submission of application;

(7) a written opinion of legal counsel, addressed to the Board, stating the bonds are required to be included under the state ceiling and that the issuer is legally authorized to issue bonds for projects of the same type and nature as the project which is the subject of the application. This opinion shall cite by constitutional or statutory reference, the provision of the Constitution or law of the state which authorizes the bonds for the project;

(8) if known at the time of the application and a project is identified for a qualified residential rental project issue, an issuer shall provide a copy of an executed earnest money contract between the borrower and the seller of the project. This earnest money contract must be in effect at the time of submission of the application to the Board and expire no earlier than December 1, 2008. The earnest money contract must stipulate and provide for the borrower's option to extend the contract expiration date through February 15 of the program year, subject only to the seller's receipt of additional earnest money or extension fees, so that the borrower will have site control at the time a reservation is granted. If the borrower owns the property, evidence of ownership must be provided.

(9) Utilization percentage as defined in §1372.0261, Government Code does not apply to the Emergency Housing Volume Cap.

(e) Bond authorization requirements. Unless an election for carryforward is filed not later than 35 calendar days after an issuer's reservation date, the Board or Comptroller of Public Accounts, as applicable, must be in receipt of the following from the issuer:

(1) one-third of the closing fee;

(2) the certificate regarding fees, on the form prescribed by the Board;

(3) a certificate signed by the issuer or authorized representative of the issuer that certifies the principal amount of the bonds to be issued or the portion of the state ceiling that will be converted to mortgage credit certificates;

(4) a list of finance team members with their addresses and telephone numbers;

(5) a bond authorization requirements checklist, on the form prescribed by the Board;

(6) if the borrower was originally identified as a to-be-formed entity, the final formation of the borrower must be identified as part of the submission and must meet the specifications set forth in the application for reservation of allocation. No changes will be

permitted in the general partner, or managing member, as applicable, of the borrower after the 35th day after the date of reservation.

(f) Closing fee. The remaining two-thirds of the fee must be paid by all issuers simultaneously with closing on the bonds. The Board shall be in receipt of the fee from the issuer as confirmed by the Comptroller of Public Accounts not later than the fifth business day after the day on which the bonds are closed.

(g) Closing documents. Not later than the fifth business day after the day on which the bonds are closed the issuer shall file with the Board:

(1) a certificate regarding fees, on the form prescribed by the Board;

(2) a closing documents checklist, on the form prescribed by the Board;

(3) a certificate of delivery on the form prescribed by the Board;

(4) a certified copy of the bond resolution authorizing the issuance of bonds, and setting forth the specific principal amount of the bond issue;

(5) if one is required, a copy of the approval of the local government unit or local government units, certified by a public official with the authority to certify such approval. This requirement shall not apply to any bonds for which the Code does not require such a public hearing and approval of a local government unit or local government units;

(6) the document evidencing compliance with §1372.040, Government Code;

(7) other documents relating to the issuance of bonds, including a statement of the bonds':

(A) principal amount;

(B) interest rate or the formula by which the interest is calculated;

(C) maturity schedule;

(D) purchaser or purchasers; and

(8) an official statement.

(9) If permitted by the Internal Revenue Code an issuer who elects to issue mortgage credit certificates shall file item in paragraph (1) of this subsection and the following:

(A) a certified copy of the issuer's resolution electing to convert state ceiling to mortgage credit certificates;

(B) issuer's mortgage credit certificate election; and

(C) program plan.

(10) For a residential rental project described in §190.2(d)(1) or (2) of this title, evidence from the Texas Department of Housing and Community affairs that an award of Low Income Housing Tax Credits has been approved for the project.

(11) Additional information. The Board may require additional information at any time before granting a certificate of reservation or certificate of allocation.

(h) Every issuer of a qualified housing issue that has an active reservation under the Standard Volume Cap may submit to the Board an Emergency Housing Volume Cap Election Form requesting volume cap from Emergency Housing Volume Cap.

(1) There is no fee for this conversion.

(2) Conversion from Standard Volume Cap does not affect closing date deadline.

(i) Issuers of qualified housing bonds may submit an application for reservation of volume cap from the Standard Volume Cap and an application for reservation from the Emergency Housing Volume Cap; however, no application from the same issuer for the same project shall be for the same amount required for such project.

(j) An application for a reservation for the Emergency Housing Volume Cap may not be submitted and a reservation may not be granted after December 31, 2008.

(k) Any application regarding carryforward of the Emergency Housing Volume Cap shall be designated to each qualifying issuer of qualified mortgage bonds or an issuer of qualified residential rental projects bonds that has applied for such carryforward independent of any request for a reservation utilizing the Emergency Housing Volume Cap.

(l) Sections 190.4 - 190.8 of this title will apply to Emergency Volume Cap unless modified by this section.

(m) Designation of Emergency Housing Volume Cap Carryforward

(1) Any application regarding carryforward of the Emergency Housing Volume Cap shall be designated to each qualifying issuer of qualified mortgage bonds or an issuer of qualified residential rental project bonds that has applied for such carryforward independent of any request for a reservation.

(2) An Emergency Housing Volume Cap carryforward designation may be requested at anytime before or on December 31, 2008.

(3) On an active Emergency Housing Volume Cap reservation, if the carryforward election is made before the 35-day filing, then the entire closing fee is due after the closing of the bonds.

(4) Issuers that have been designated carryforward from the Emergency Housing Volume Cap will have until December 31, 2010 to issue bonds.

(n) Qualified housing bonds will be subject to any modifications made to Chapter 1372, Government Code by the Texas Legislature.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 2, 2008.

TRD-200804712
Bob Kline
Executive Director
Texas Bond Review Board
Effective Date: September 3, 2008
Expiration Date: December 31, 2008
For further information, please call: (512) 475-4800

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (Department) proposes amendments to 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines. These sections are proposed for amendment in order to address guidelines for underwriting, market analysis, appraisal, environmental site assessment, and property condition assessment performed for requests submitted to the Department for review and the establishment of reserve for replacement and subsequent monitoring for developments funded through the Department.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended sections are in effect the public benefit anticipated as a result of enforcing the amended sections will be the more efficient organization and use of Department resources as a result of providing separate processes for the disposition of Department assets and the assessment and collection of administrative penalties. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The amendments are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The amended sections affects no other code, article or statute.

§1.31. General Provisions.

(a) (No change.)

(b) Definitions. Terms used in this subchapter that are also defined in Chapter 50 of this title (the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP. Those terms [~~Terms~~] that are not defined in the QAP or which may have another meaning when used in this subchapter, shall have the meanings set forth in §1.32(b) of this subchapter.

(1) - (11) (No change.)

(12) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance which are developed by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") or national non-metro area.

(13) - (19) (No change.)

(20) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 50% [~~40%~~] of gross income towards total housing expenses.

(21) (No change.)

(22) Restricted Market Rent--The restricted rent concluded by the Qualified Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units with the same rent and income restrictions.

(23) (No change.)

(24) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services, to more stable, productive lives by offering residents an array of supportive services. [~~Sometimes referred to as "Transitional Housing." Rental housing intended solely for occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.~~]

(25) - (30) (No change.)

(c) (No change.)

§1.32. Underwriting Rules and Guidelines.

(a) - (c) (No change.)

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will update the utility allowance and calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application. The conservative basis for a restricted unit is the lesser of the Gross Program Rent less Utility Allowances ("Net Program Rent") or Restricted Market Rent. The conservative basis for an unrestricted unit is the lesser of the Market Rent or Applicant's projected rent where the Applicant's projected rent is reasonable to the Underwriter. Where Contract Rents are included, they will be used regardless of the conservative basis derived rent.

(i) - (ii) (No change.)

(iii) Gross Program Rents less Utility Allowance or Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application. The Underwriter uses the Gross Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the Applications are underwritten with the rents promulgated for the same year. Gross Program Rents are reduced by the Utility Allowance. [~~The Utility Allowance figures used are determined based upon what is identified in the Application by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the Application.~~]

(I) - (IV) (No change.)

(iv) (No change.)

(B) - (D) (No change.)

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of properties [~~property~~] in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components must be documented by experience of third parties not related to the contractor or component vendor. Finally, well documented information provided in the Market Analysis, the Application, and other sources may be considered.

(A) - (H) (No change.)

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. The Applicant's expense for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund future capital needs as documented by the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) (No change.)

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If a rationale [~~an~~] acceptable to the Underwriter [~~rationale~~] for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) (No change.)

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter.

(i) (No change.)

(ii) The maximum rate allowed for a competitive application cycle is determined [~~evaluated~~] by the Director of the Department's division responsible for Credit Underwriting Analysis Reports based upon current market conditions and posted to the Department's web site prior to the close of the Application Acceptance Period. [~~His-~~

~~torically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.~~]

(B) Amortization Period. The Department [~~generally~~] requires an amortization of not less than 30 years and not more than 40 [~~50~~] years(50 years for federally sourced loans), or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) (No change.)

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 based upon documentation of acceptance from the lender.

(i) (No change.)

(ii) If the DCR is greater than the minimum, the recommendations of the Report may be conditioned upon an increase in the debt service and the Underwriter may make adjustments to the requested financing structure in the order presented in subclauses (I) and (II) of this clause. If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) - (III) (No change.)

(iii) - (iv) (No change.)

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

(A) (No change.)

(B) A 2% [~~3%~~] annual growth factor is utilized for income and a 3% [~~4%~~] annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include:

(i) - (iv) (No change.)

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's total development cost is within 5% of the Underwriter's estimate. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) (No change.)

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team or permanent lender:

(I) - (II) (No change.)

(ii) - (iii) (No change.)

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The Underwriter will prorate the actual sales price or identity of interest adjusted sales price based upon a calculated "as-is" improvement value over the total "as-is" value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment. In the case where the land value indicated by either the appraisal or tax assessment is greater than the prorata land value attributed to the sales price as described above, the greater of the land value in the appraisal or tax assessment is deducted from the sales price to determine the acquisition basis.

(2) - (3) (No change.)

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party cost estimating data source and historical final cost certifications of all previous Housing Tax Credit allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party data source, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development.

(ii) (No change.)

(B) Rehabilitation including Reconstruction Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule, the Underwriter may request a supplement executed by the PCA provider reconciling [~~supporting~~] the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant's [~~Applicant~~] project cost schedule including any soft cost contingency will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 5% of direct costs plus site work for new construction Developments and 10% of direct costs plus site work for rehabilitation Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs

in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited at a total of 14%. The percentage is applied to the sum of the direct construction costs plus site work costs. For tax credit Developments, the percentages are applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible construction costs but will be ineligible for tax credit basis purposes.

(7) Developer Fee. Developer fee claimed must be adjusted by the same applicable percentage from [~~proportionate to the work for~~] which it is calculated [~~earned~~] and consistent with §49.9(d)(6) of this title. Additional fees for ineligible costs will be limited to the same percentage of ineligible development costs but will be ineligible for tax credit basis purposes. All fees to related parties to the owner or developer for work determined by the Underwriter to be typically completed by the developer will be considered part of the Developer fee claimed.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits:

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less;[~~,~~] and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) (No change.)

(8) (No change.)

(9) Reserves. The Department will utilize [~~the terms proposed by the syndicator or lender as described in the commitment letter(s) or~~] the amount described in the Applicant's project cost schedule if it is within the range of two to six months of stabilized operating expenses less management fees and reserve for replacements plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the conventional lender or syndicator if the detail for such greater amount is well documented in the conventional lender or syndicator commitment letter.

(10) (No change.)

(f) - (h) (No change.)

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraph [~~paragraphs~~] (1) or (2) [~~- (3)~~] of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) [~~(4) - (6)~~] of this subsection applies unless paragraph (6) [~~(7)~~] of this subsection also applies.

(1) Inclusive Capture Rate. The method for determining the inclusive capture rate for a Development is defined in §1.33(d)(10)(E) of this subchapter. The Underwriter will independently verify all components and conclusions of the inclusive capture rate and may at their discretion use independently acquired [~~aquired~~] demographic data to calculate demand. The Development:

(A) - (C) (No change.)

[~~(2) Concentration Rate. The Underwriter will independently verify the number of rental units in multi-unit buildings based on the most recent Census data and the completion of Department funded or other known rental Developments in the area.~~]

[~~(A) The Development is in a Census Tract(s), as established by the U.S. Census Bureau, where the total number of rental units in buildings with three or more units exceeds the ratio of 1,432 units per square mile.~~]

[~~(B) The Primary Market Area is contained in Census Tract(s), as established by the U.S. Census Bureau, where the total number of rental units in buildings with three or more units exceeds the ratio of 1,000 units per square mile.~~]

[~~(C) Development's in areas which exceed the limits in subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if paragraph (1)(C)(i) or (ii) of this subsection applies.~~]

(2) [~~(3)~~] Deferred Developer Fee. Developments [~~Development~~] requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first 15 years of the long term proforma as described in subsection (d)(5) of this section.

(3) [~~(4)~~] Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the Net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the Applicant accepts the Underwriting recommendation that [~~development proposes~~] all restricted units have [~~with~~] rents and incomes restricted at or below the 50% of AMGI level.

(4) [~~(5)~~] Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 65%.

(5) [~~(6)~~] Long Term Feasibility. Any year in the first 15 years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects:

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(6) [~~(7)~~] Exceptions. The infeasibility conclusions may be excepted where either of the following apply.

(A) The requirements in this subsection may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments meeting the requirements of one or more of paragraphs (3) - (5) [~~(4) - (6)~~] of this subsection will be re-characterized as feasible if one or more of clauses (i) - (vi) of this subparagraph apply.

(i) The Development will receive Project-based Section 8 Rental Assistance for at least 50% of the units and a firm commitment with terms including contract rent and number of units is submitted at application.

(ii) The Development will receive rental assistance for at least 50% of the units in association with USDA-RD-RHS financing.

(iii) The Development will be characterized as public housing as defined by HUD for at least 50% of the units.

(iv) The Development will be characterized as [~~100%~~] Supportive Housing for at least 50% of the units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents for at least 50% of the units that allow rents to increase based upon expenses and those rents are currently more than 10% lower than both the Net Program Rent and Restricted Market Rent.

(vi) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) - (c) (No change.)

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) - (6) (No change.)

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055).

(A) The Secondary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 250,000 people for Developments targeting families;[~~,~~] and

(ii) boundaries based on:

(I) major roads;[~~,~~]

(II) political boundaries;[~~,~~] and

(III) - (IV) (No change.)

(B) - (C) (No change.)

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than

[(I)] 100,000 people; and [~~for Developments targeting the general population, and~~]

[(II) ~~250,000 people for Qualified Elderly Developments or Developments targeting special needs populations,~~]

(ii) boundaries identifying the most recent Census Tract definitions, as established by the U.S. Census Bureau and based on:

(I) major roads;[~~,~~]

(II) political boundaries;[~~,~~] and

(III) - (IV) (No change.)

(B) - (C) (No change.)

(9) Market Information.

(A) For each of the defined market areas and all census tracts contained in whole or in part by that area, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the Secondary Market, if applicable:

(i) total housing;[~~,~~]

(ii) rental developments (all multi-family);[~~,~~]

(iii) Affordable Housing;[~~,~~]

(iv) Comparable Units;[~~,~~]

(v) Unstabilized Comparable Units;[~~,~~] and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C) of this subchapter). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;[~~,~~]

(ii) quality of construction (class);[~~,~~]

(iii) Targeted Population;[~~,~~] and

(iv) (No change.)

(C) (No change.)

(D) Turnover. Turnover rates [~~The turnover rate~~] should be specific to the Targeted Population. The data supporting the turnover rate must originate from documented turnover rates from the most current Department data on the Department web site or the most current U.S. Census Bureau tenure appropriate data for movership rates over the last 12 months or next shortest term. The Market Analyst should use the more reasonable rate, supported by IREM (Institute for Real Estate Management) or independent surveys conducted by the Market Analyst and which is subject to review by the Underwriter. [~~at least one of the following~~]

[(i) ~~Comparable Units,~~]

[(ii) ~~the defined PMA,~~]

[(iii) ~~the defined Secondary Market, and~~]

[(iv) ~~a Third Party data collection agency or demographer.~~]

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and

each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to elderly population for an elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the following they should be clearly identified and documented as to their source in the report.

(I) (No change.)

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development. [~~State the target adjustment rate.~~]

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up). [~~State the Household Size-Appropriate adjustment rate.~~]

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 50% [~~40%~~] for Qualified Elderly households, and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up) or one person for efficiency units.

[~~(-c-) State the Income Eligible adjustment rate.~~]

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary. [~~State the Tenure-Appropriate adjustment rate.~~]

(ii) (No change.)

(iii) Demand from Home Ownership Turnover for Qualified Elderly Developments. Apply the turnover rate as described in subparagraph (D) of this paragraph, but not greater than 10%, to the target, income-eligible, size-appropriate and owner households in the PMA projected at the proposed placed in service date.

(iv) [~~(iii)~~] Demand from Population Growth. Calculate the target, income-eligible, size-appropriate and tenure-appropriate household growth in the PMA for the twelve month period following the proposed placed in service date.

(v) [~~(iv)~~] Demand from Secondary Market Area.

(I) Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the Secondary Market Area projected at the proposed placed in service date.

(II) Not more than 25% of the demand can come from outside the PMA as calculated in subclause (I) of this clause and be included in the calculation of demand as described in paragraph (10)(D) of this subsection and for use in calculation of inclusive capture rate as described in paragraph (10)(E) of this subsection. In addition, 25% of the Comparable Units from Unstabilized Developments within the Secondary Market Area must be included in the calculation of inclusive capture rate.

(vi) [~~(v)~~] Demand from Other Sources. The source of additional demand and the methodology used to calculate the additional demand must be clearly stated. Calculation of additional demand must factor in the adjustments described in clause (i) of this subparagraph.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (G) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) (No change.)

(B) Rents. Provide a separate Market Rent and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this subchapter.

(i) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of:

(I) Development name;[~~,~~]

(II) address;[~~,~~]

(III) year of construction and year of rehabilitation, if applicable;[~~,~~]

(IV) property condition;[~~,~~]

(V) population target;[~~,~~]

(VI) unit mix specifying number of Bedrooms, number of baths, net rentable square footage; and

(-a-) monthly rent and utility allowance;[~~,~~] or

(-b-) sales price with terms, marketing period and date of sale;[~~,~~]

(VII) description of concessions;[~~,~~]

(VIII) list of unit amenities;[~~,~~]

(IX) utility structure;[~~,~~]

(X) list of common amenities;[~~,~~] and

(XI) for rental developments only:

(-a-) occupancy;[~~,~~] and

(-b-) turnover.

(ii) - *(iii)* (No change.)

(C) - (D) (No change.)

(E) Inclusive Capture Rate. The Market Analyst must calculate inclusive capture rates for the subject Development's proposed Unit types by number of Bedrooms and rent restriction categories, market rate Units, if applicable, and total Units. The Underwriter will adjust the inclusive capture rates to take into account any errors or omissions. To calculate an inclusive capture rate:

(i) total:

(I) the proposed subject Units;[,]

(II) Comparable Units with priority, as defined in §49.9(d)(2) of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision; and

(III) Comparable Units in previously approved but Unstabilized Developments;[,] and

(ii) - (iii) (No change.)

(F) - (G) (No change.)

(11) - (12) (No change.)

(e) - (f) (No change.)

§1.34. Appraisal Rules and Guidelines.

(a) - (c) (No change.)

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) - (6) (No change.)

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) - (D) (No change.)

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however,[;] the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) (No change.)

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the cost approach is not applicable.

(A) (No change.)

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) (No change.)

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) (No change.)

(II) Net Operating Income/Unit of Comparison. The net operating income statistics or [~~for~~] the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) (No change.)

(10) - (12) (No change.)

(e) (No change.)

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) (No change.)

(b) In addition to ASTM requirements, the report must:

(1) - (2) (No change.)

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;[,]

(4) - (7) (No change.)

(c) - (e) (No change.)

§1.36. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment (the PCA) is to provide cost estimates for repairs, replacements, or new construction which are: immediately necessary; proposed by the developer; and expected to be required throughout the term of the regulatory period and not less than 30 years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments: Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018" except as provided for in subsections (b) and (c) of this section. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA must include discussion and analysis of the following:

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived;[.]

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject property;[.]

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points; and[.]

(4) (No change.)

(b) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments;[,]

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;[,]

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports;[,]

(4) TX-USDA-RHS guidelines for Capital Needs Assessment;[,] or

(5) (No change.)

(c) - (d) (No change.)

§1.37. Reserve for Replacement Rules and Guidelines.

(a) (No change.)

(b) The First Lien Lender shall maintain the reserve account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and §2306.186.

(1) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond indenture or tax credit syndication, the Department shall:

(A) (No change.)

(B) Be given notice of any asset management findings or reports, transfer of money in reserve accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within 30 days of any receipt or determination thereof; and

(C) (No change.)

(2) - (3) (No change.)

(c) If the Department is not the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) - (2) (No change.)

(3) A statement by the First Lien Lender.

(A) - (B) (No change.)

(d) (No change.)

(e) If the Department is the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section.[:]

(1) - (3) (No change.)

(f) - (l) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804807
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 5. COMMUNITY SERVICES PROGRAMS

SUBCHAPTER A. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.1 - 5.15

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (Department) proposes the repeal of 10 TAC Chapter 5, Subchapter A, §§5.1 - 5.15, concerning the Community Services Block Grant (CSBG). The repeal is proposed in order to consolidate and simplify the existing rules for all Community Affairs Division Programs.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§5.1. Background.
§5.2. Purposes and Goals.
§5.3. Definitions.
§5.4. Eligible Entities.
§5.5. Designation and Redesignation of Eligible Entities in Unserved Areas.
§5.6. Distribution of CSBG Funds.
§5.7. Uses of Funds.
§5.8. State Application and Plan.
§5.9. CSBG Needs Assessment and Community Action Plan.
§5.10. Selection, Composition and Powers of Boards of Eligible Entities.

§5.11. Meeting Requirements of Boards of Eligible Entities.

§5.12. Monitoring of Eligible Entities.

§5.13. Limitations on Use of Funds.

§5.14. Client Income Guidelines.

§5.15. Program Administration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER C. EMERGENCY SHELTER GRANTS PROGRAM

10 TAC §§5.200 - 5.211

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 5, Subchapter C, §§5.200 - 5.211, concerning the Emergency Shelter Grants Program. These repeals are proposed in order to consolidate and simplify the existing rules for all Community Affairs Division Programs.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules to enhance the state's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§5.200. Purpose.

§5.201. Background.

§5.202. Definitions.

§5.203. Allocation of Funds.

§5.204. Application Requirements.

§5.205. Application Limitations.

§5.206. Ineligible Activities.

§5.207. Application Process.

§5.208. Process for Review of Applications.

§5.209. Application Scoring.

§5.210. Funds Distribution.

§5.211. Program Administration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS
SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§5.1 - 5.20

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter A, §§5.1 - 5.20 concerning Community Affairs Programs, General Provisions. The purpose of the new Chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and

public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§5.1. Purpose and Goals.

(a) The rules established herein for Chapter 5 "Community Affairs Programs" Subchapter A "General Provisions" applies to all Community Affairs Division programs with the exception of the Section 8 Housing Choice Voucher Program. Refer to Subchapter F of this chapter for the rules governing the Section 8 Housing Choice Voucher Program. Additional program specific requirements are contained within each program subchapter.

(b) The programs administered by the Community Affairs (CA) Division of the Texas Department of Housing and Community Affairs (the Department) support the Department's mission to help Texans achieve an improved quality of life through the development of better communities.

(c) The Department accomplishes this mission by acting as a conduit for federal grant funds for housing and community affairs programs. Ensuring program compliance with the state and federal laws that govern the CA programs is another important part of the Department's mission. Oversight and program mandates ensure state and federal resources are expended in an efficient and effective manner.

§5.2. Cost Principles and Administrative Requirements.

Except as expressly modified by law or the terms of the contracts, subrecipient shall comply with the cost principles and uniform administrative requirements set forth in the Uniform Grant and Contract Management Standards, 1 TAC §§5.141, et seq. (the "Uniform Grant Management Standards") provided, however, that all references therein to "local government" shall be construed to mean subrecipient. Uniform cost principles for local governments are set forth in Office of Management and Budget (OMB) Circular A-87, and for non-profit organizations in OMB Circular A-122. Uniform administrative requirements for local governments are set forth in OMB Circular A-102, and for non-profits in OMB Circular A-110. OMB Circular A-133 "Audits of States, Local Governments, and Non-Profit Organizations," provides audit standards for governmental organizations and other organizations expending federal funds. The expenditure threshold requiring an audit under OMB Circular A-133 is $500,000.

§5.3. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Community Affairs Programs, a list of terms and definitions has been compiled as a reference.

(b) The following words and terms in this chapter shall have the following meaning unless the context clearly indicates otherwise.

(1) CAA--Community Action Agency.

(2) CFR--Code of Federal Regulations.

(3) Children--Household dependents not exceeding 18 years of age.

(4) Collaborative Application--An application from two or more organizations which will use Emergency Shelter Grants Program (ESGP) funds to provide services to the target population as part of a local continuum of care. If a unit of general local government applies for only one organization, this will not be considered a collaborative application. Partners in the collaborative application must coordinate services and prevent duplication of services.

(5) Community Action Plan--A plan required by the Community Services Block Grant (CSBG) Act which describes the local (subrecipient) service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant.

(6) Cooling--Modifications including, but not limited to, the repair or replacement of air conditioning units, evaporative coolers, and refrigerators.

(7) Community Action Agencies (CAAs)--Local private and public non-profit organizations that carry out the Community Action Program (CAP), which was founded by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States. Each CAA must have a board consisting of at least one-third low-income community members, one-third public officials, and up to one-third private sector leaders.

(8) Community Affairs Division (CAD)--The Division at the Texas Department of Housing and Community Affairs which administers the CSBG, ESGP, Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP), and Section 8 Housing Choice Voucher Programs.

(9) The Community Services Block Grant (CSBG)--A grant which provides U.S. federal funding for Community Action Agencies (CAAs) and other eligible entities that seek to address poverty at the community level. Like other block grants, CSBG funds are allocated to the states and other jurisdictions through a formula.

(10) Community Services Block Grant (CSBG) Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, et seq. The act authorized establishing a community services block grant program to make grants available through the program to States to ameliorate the causes of poverty in communities within the States.

(11) CSBG Subrecipient--Includes CSBG eligible entities and other organizations that are awarded CSBG funds.

(12) Department--The Texas Department of Housing and Community Affairs.

(13) Discretionary Funds--Those CSBG funds maintained in reserve by a State, at its discretion, for CSBG allowable uses as authorized by §675C of the CSBG Act, and not designated for distribution on a statewide basis to CSBG eligible entities and not held in reserve for state administrative purposes.

(14) DOE--The United States Department of Energy.

(15) DOE WAP Rules--10 CFR §440 of the Code of Federal Regulations describing the Weatherization Assistance for Low Income Persons as administered through the Department of Energy.

(16) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

(17) Equipment--A tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of $5,000 or more per unit. For CSBG, CEAP, and WAP, if the unit acquisition cost exceeds $5,000, approval from the TDHCA Community Affairs Division must be obtained before the purchase takes place. For ESGP, if the unit acquisition cost exceeds $500, approval from TDHCA Community Affairs Division must be obtained before the purchase is made.

(18) Elderly Person--A person who is sixty (60) years of age or older.

(19) Electric Base-Load Measure--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(20) Eligible Entity--Those local organizations in existence and designated by the federal government to administer programs created under the federal Economic Opportunity Act of 1964. This included community action agencies, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization in effect on the day before the enactment of the Coats Human Services Reauthorization Act of 1998 or is designated by the Governor to serve a given area of the State and that has a tripartite board or other mechanism for local governance.

(21) Emergency--Defined by the LIHEAP Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §8622):

(A) natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary;

(D) a significant increase in home energy disconnections reported by a utility, a State regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the State temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary, at the discretion of the Secretary, may determine to be appropriate.

(22) Energy Repairs--Weatherization related repairs necessary to protect or complete regular weatherization energy efficiency measures.

(23) Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of weatherization measures to be installed in a dwelling unit.

(24) Families with Young Children--A family unit that includes a child not exceeding 6 years of age.

(25) USHHS--U.S. Department of Health and Human Services.

(26) High Energy Burden--Determined by dividing a household's annual home energy costs by the household's annual gross income. The percentage at which energy burden is considered high is defined by data gathered from the State Data Center.

(27) High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures expressed in the data collected from the State Data Center.

(28) Homeless or homeless individual--An individual who:

(A) lacks a fixed, regular, and adequate nighttime residence; or

(B) has a primary nighttime residence that is:

(i) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(ii) an institution that provides a temporary residence for individuals intended to be institutionalized; or,

(iii) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. (Exclusion: The term "homeless" or "homeless individual" does not include any individual imprisoned or otherwise detained pursuant to an Act of Congress or a State law.)

(29) Household--Any individual or group of individuals who are living together in a dwelling unit as one economic unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(30) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty households of that county.

(31) Local Units of Government--City, county, or council of governments.

(32) Low Income--Income in relation to family size which:

(A) For CEAP, WAP, and CSBG is at or below 125 percent of the Federal Income guidelines;

(B) For ESGP is at or below 100% of the poverty level, determined in accordance with criteria established by the Director of the Office of Management and Budget;

(C) Is the basis on which cash assistance payments have been paid during the preceding twelve month-period under titles IV and XVI of the Social Security Act or applicable state or local law; or

(D) If a State elects, is the basis for eligibility for assistance under the Low Income Home Energy Assistance Act of 1981, provided that such basis is at least 125 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget.

(33) Low Income Home Energy Assistance Program (LIHEAP)--A federally funded block grant program that is implemented to serve low income households who seek assistance for their home energy bills and/or weatherization services.

(34) Migrant Farm worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(35) Multifamily Dwelling Unit--A structure containing more than one dwelling unit.

(36) National Performance Indicator--An individual measure of performance within the Department's reporting system for measuring performance and results of subrecipients of funds. There are currently twelve indicators of performance which measure self-sufficiency, family stability, and community revitalization.

(37) Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds. The assessment is a required part of the Community Action Plan per Assurance 11 of the CSBG Act.

(38) OMB--Office of Management and Budget, a federal agency.

(39) Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(40) Performance Statement--A document which identifies the services to be provided by a CSBG subrecipient. The document is an attachment to the CSBG contract entered into by the Department and the CSBG subrecipient.

(41) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(6) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C., Chapter 11 or 15.

(42) Population Density--The number of persons residing within a given geographic area of the state.

(43) Poverty Income Guidelines--The official poverty income guidelines as issued by the U.S. Department of Health and Human Services annually.

(44) Private Nonprofit Organization--An organization which has status as a §501(c) tax-exempt entity. Private nonprofit organizations applying for ESGP funds must be established for charitable purposes and have activities that include, but are not limited to, the promotion of social welfare and the prevention or elimination of homelessness. The entity's net earnings may not inure to the benefit of any individual(s).

(45) Public Organization--A unit of local government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(46) Referral--The process of providing information to a client household about an agency, program, or professional person that can provide the service(s) needed by the client.

(47) Rental Unit--A dwelling unit occupied by a person who pays rent for the use of the dwelling unit.

(48) Renter--A person who pays rent for the use of the dwelling unit.

(49) Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the household annualized income must be derived from the agricultural labor or related industry.

(50) Secretary--Chief Executive of the U.S. Department of Health and Human Services.

(51) Service--The provision of work or labor that does not produce a tangible commodity.

(52) Shelter--Defined by the Department as a dwelling unit or units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities.

(53) Single Family Dwelling Unit--A structure containing no more than one dwelling unit.

(54) Social Security Act--42 U.S.C. §§601, et seq., CSBG works with activities carried out under Title IV Part A to assist families to transition off of state programs.

(55) State--The State of Texas or the Texas Department of Housing and Community Affairs.

(56) Subcontractor--An organization with whom the subrecipient contracts with to administer programs.

(57) Subrecipient--According to each program subchapter, subrecipient may be defined as organizations with whom the Department contracts with and provides CSBG funds; ESGP funds; DOE funds or, LIHEAP funds.

(58) Supplies--All personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR Part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(59) TAC--Texas Administrative Code

(60) Targeting--Focusing assistance to households with the highest program applicable needs.

(61) Terms and Conditions--Binding provisions provided by a funding organization to grantees accepting a grant award for a specified amount of time.

(62) Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15 any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a State or local agency.

(63) Units of General Local Government--A unit of local government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(64) U.S.C.--United States Code of Regulations

(65) Vendor Agreement--An agreement between the subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(66) WAP--Weatherization Assistance Program.

(67) WAP PAC--Weatherization Assistance Program Policy Advisory Council. The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the WAP program.

(68) Weatherization Material--The material listed in Appendix A of 10 CFR §440.

(69) Weatherization Project--A project conducted in a single geographical area which undertakes to reduce heating and cooling demand of dwelling units that are energy inefficient.

§5.4. Prohibitions.

(a) Lobbying activity is prohibited. The Hatch Act, 5 U.S.C., Chapter 15 and the amendments to the Hatch Act and the repeal of §675(e) and §675(C)(6) of the Community Services Block Grant (CSBG) Act do not affect §675(C)(7) of the CSBG Act.

(b) Knowingly hiring an undocumented worker is prohibited, 8 U.S.C. §1324a.

(c) Discrimination is prohibited.

(1) Civil Rights Act of 1964, (42 U.S.C. §§2000, et seq.) Age Discrimination Act of 1975 (42 U.S.C. §§6101, et seq.). Rehabilitation Act of 1973 (29 U.S.C. §794), and Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§12131, et seq.) shall apply to all programs or activities administered by subrecipients including the nondiscrimination provisions of the CSBG (42 U.S.C. §§9901, et seq.).

(2) All subrecipients receiving federal funds must be equal opportunity employers and render services without regard to race, color, religion, sex, national origin, age, handicap, political affiliation or belief. Information on equal opportunity and nondiscrimination shall be made available to participants, employees, subcontractors, and interested parties.

§5.5. Certificate and Disclosure Regarding Lobbying Activities.

(a) Subrecipients of federal funding, including those who receive federal funds through the Department, are subject to the anti-lobbying provisions commonly referred to as "the Byrd Amendments" (31 U.S.C. §1352). The legislation imposes certain requirements for disclosure and certification on recipients of federal contracts, grants, cooperative agreements, and loans, including the requirement that each recipient of a federal contract in excess of $100,000 must complete the Standard Form-LLL "Disclosure of Lobbying Activities" form.

(b) A §501(c)(3) nonprofit organization which pays any person funds from any source (even non-federal funds) to lobby Congress or which pays an employee of any federal agency in connection with this grant, must complete the "Disclosure of Lobbying Activities" form available on the Office of Management and Budget (OMB) website. The subrecipient must also file quarterly updates about its employment of lobbyists if material changes occur in the organization's use of lobbyists.

(c) For each contract, grant, cooperative agreement, or loan in excess of $100,000, the subrecipient must complete the "Certification Regarding Lobbying" form and return it to the Department. This form is located on the Department's website. By completing the certification, the subrecipient verifies that no federally appropriated funds have been used to lobby the United States Congress.

(d) Pursuant to the 1996 Simpson-Craig Amendment to the Lobbying Disclosure Act, 2 U.S.C. §1611, §501(c)(4) non-profit organizations, typically civic leagues or employee associations, may not receive any federal funding if such organizations engage in lobbying. The law establishes civil penalties for noncompliance, with possible penalties ranging from $10,000 to $100,000.

§5.6. Texas Public Information Act.

The Texas Public Information Act (TPIA), Texas Government Code, Chapter 552, formerly the Texas Open Records Act, applies to recipients of public funds such as programs administered by the Department. It is the policy of the state that each person is entitled at all times to complete information about the affairs of government and the official acts of public officials and employees unless otherwise expressly provided by law.

§5.7. Fidelity Bond Requirements.

The Department is required to assure that fiscal control and accounting procedures for federally funded entities will be established to assure the proper disbursal and accounting for the federal funds paid to the state (A-110 "Administrative Requirements for Grants to Non-Profits"). In compliance with that assurance the Department requires program subrecipients to maintain adequate fidelity bond coverage. A fidelity bond is a bond indemnifying the subrecipient against losses resulting from the fraud or lack of integrity, honesty or fidelity of one or more of its employees, officers, or other persons holding a position of trust.

(1) In administering program contracts, subrecipients shall observe their regular requirements and practices with respect to bonding and insurance. In addition, the Department may impose bonding and insurance requirements by contract.

(2) If a subrecipient is a non-governmental organization, the Department requires an adequate fidelity bond. If the amount of the fidelity bond is not prescribed in the contract, the fidelity bond must be for a minimum of $10,000 or an amount equal to the contract if less than $10,000. The bond must be obtained from a company holding a certificate of authority to issue such bonds in the State of Texas.

(3) The fidelity bond coverage must include all persons authorized to sign or counter-sign checks or to disburse sizable amounts of cash. Persons who handle only petty cash (amounts of less than $250) need not be bonded, nor is it necessary to bond officials who are authorized to sign payment vouchers, but are not authorized to sign or counter-sign checks or to disburse cash.

(4) The Department must receive written assurance from the subrecipient that the required fidelity bond has been established. The assurance letter must be received from the bonding company or agency stating the type of bond, the amount and period of coverage, the positions covered, and the annual cost of the bond. Compliance must be continuously maintained thereafter. A copy of the actual policy shall remain on file with the subrecipient and shall be subject to monitoring by the Department.

(5) Subrecipients are responsible for filing claims against the fidelity bond when a covered loss is discovered. The Department may take any one or more of the following actions for noncompliance.

(A) Deny subrecipient's requests for advances and place the subrecipient on a cost reimbursement plan until written assurance of compliance is received by the Department.

(B) Withhold subrecipient payments (either reimbursement or advance) until written assurance of compliance is received by the Department.

(C) Suspend performance of the contract until written assurance of compliance is received by the Department.

(D) Contract termination.

§5.8. Inventory Report.

(a) The Department requires the submission of an inventory report on an annual basis to be submitted to the Department, no later than sixty (60) days after the original end date of the contract.

(b) Vehicles, tools, and equipment purchased with funds under a contract with the Department, must be inventoried and reported to the Department during the contract period.

(c) The inventory report is cumulative and is used for vehicles, tools, and equipment with a useful life of one year of more and a unit

acquisition cost of greater than $5,000 for Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP) and greater than $500 for Emergency Shelter Grant Program (ESGP). Property must be inventoried and reported on the Cumulative Inventory Report form. The form and instructions are found on the Department's website.

§5.9. Travel.

The governing board of each subrecipient must adopt and submit to the Department approved travel policies that adhere to Office of Management and Budget (OMB) Circulars A-87, A-110, A-122, for cost allowability. The subrecipient must follow either the federal travel regulations or State of Texas travel rules and regulations found on the Comptroller of Public Accounts website at www.cpa.state.tx.us. If the travel policy and procedures are revised they must be submitted to the Department.

§5.10. Procurement Standards.

(a) Procurement procedures must meet minimum guidelines, according to Office of Management and Budget (OMB) Circulars A-87, A-102, A-110, A-122 (as applicable), the Uniform Grant Management Common Rule, Texas Government Code, Chapter 783, and 10 CFR, Part 600 (Financial Assistance Rule).

(b) All subrecipients including non-profits must comply with all of the referenced statutes and regulations listed in subsection (a) of this section. In case of any conflict between the OMB Circulars and state laws involving federal funds, the OMB Circulars will prevail.

(c) Additional Department requirements are:

(1) Small purchase procedures:

(A) This procedure may be used only on those services, supplies, or equipment costing in the aggregate of $25,000 or less. For Emergency Shelter Grant Program (ESGP), the threshold is $500 and more per unit;

(B) Subrecipient must establish a clear, accurate description of the specifications for the technical requirements of the material, equipment, or services to be procured; and

(C) Subrecipient must obtain a written price or documented rate quotation from an adequate number of qualified sources. An adequate number is, at a minimum, three different sources.

(2) Sealed bids:

(A) Subrecipient must formally advertise, for a minimum of three days, in newspapers or through notices posted in public buildings throughout the service area. Advertising beyond the subrecipient's service area is allowable and recommended by the Department. The advertisement should include, at a minimum, a response time of fourteen days prior to the closing date of the bid request. Cities and counties must comply with the statutorily imposed publication requirements in addition to those requirements stated herein; and

(B) When advertising for material or labor services, subrecipient shall indicate a period for which the materials or services are sought (e.g. for a one-year contract with an option to renew for an additional four years). This advertised time period shall determine the length of time which may elapse before re-advertising for material or labor services, except that advertising for labor services must occur at least every five years.

(3) Competitive proposals:

(A) The Request for Proposal (RFP) must be publicized. The preferred method of advertising is the local service area newspapers. This advertisement should, at a minimum, allow fourteen days before the RFP is due. The due date must be stated in the advertisement; and

(B) The time period for services shall be one year, plus four additional years at a maximum.

(4) Non-competitive proposals:

(A) The service, supply, or equipment is available only from a single source;

(B) A public emergency exists preventing the time required for competitive solicitation; and

(C) After solicitation of a number of sources, competition is determined inadequate.

(5) Required contract provisions shall include the following contract provisions or conditions in procurement contracts or subcontracts:

(A) Contracts in excess of $25,000 shall include contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances where subcontractors violate or breach the contract terms, and provide for such remedial actions as may be appropriate;

(B) All contracts in excess of $25,000 shall include suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the subrecipient;

(C) Contracts shall include a provision with regard to independent subcontractor status to hold harmless and indemnify subrecipient from and against any and all claims, demands and course of action asserted by any third party arising out of or in connection with the services to be performed under contract;

(D) Contracts shall include a provision regarding conflict of interest. Subrecipient's employees, officers, and/or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from subcontractors, or potential subcontractors; and

(E) Contracts shall include a provision to prevent fraud and abuse.

(i) Subrecipient shall establish, maintain, and utilize internal control systems and procedures sufficient to prevent, detect, and correct incidents of waste, fraud, and abuse in all Department funded programs and to provide for the proper and effective management of all program and fiscal activities funded by this contract. Subrecipient's internal control systems and all transactions and other significant events must be clearly documented and the documentation made readily available for review by Department.

(ii) Subrecipient shall give Department complete access to all of its records, employees, and agents for the purpose of monitoring or investigating the program. Subrecipient shall fully cooperate with Department's efforts to detect, investigate, and prevent waste, fraud, and abuse. Subrecipient shall immediately notify the Department of any identified instances of waste, fraud, or abuse.

(iii) Department will notify the funding source upon identification of possible instances of waste, fraud, and abuse or other serious deficiencies.

(iv) Subrecipient may not discriminate against any employee or other person who reports a violation of the terms of this

contract or of any law or regulation to Department or to any appropriate law enforcement authority, if the report is made in good faith.

(F) Contracts shall include a provision to the effect that any alterations, additions, or deletions to the terms of the contract which are required by changes in federal law and regulations or state statute are automatically incorporated into the contract without written and administrative code amendment hereto, and shall become effective on the date designated by such law and or regulation; and any alterations, additions, or deletions to the terms of the contract shall be amended hereto in writing and executed by both parties to the contract.

(G) Contracts shall include the following provision assuring legal authority to sign the contract.

(i) Subcontractor represents that it possesses the practical ability and the legal authority to enter into the contract, receive and manage the funds authorized by the contract, and to perform the services subcontractor has obligated itself to perform under the contract.

(ii) The person signing the contract on behalf of the subcontractor warrants that he/she has been authorized by the subcontractor to execute the contract on behalf of the subcontractor and to bind the subcontractor to all terms set forth in the contract.

(iii) Department shall have the right to suspend or terminate the contract if there is a dispute as the legal authority of either the subcontractor or the person signing the contract to enter into the contract or to render performances thereunder. Should such suspension or termination occur, the subcontractor is liable to the subrecipient for any money it has received for performance of provisions of the contract.

§5.11. Procurement/Cooperative Purchasing Program.

The State of Texas conducts procurement for many materials, goods, and appliances. The State of Texas procurement process complies with the required procurement provisions. For more detail about how to purchase from the State contract, please contact: Texas Building and Procurement Commission, Attn: Cooperative Purchasing Program, 1711 San Jacinto, Austin, Texas 78701 or P.O. Box 13047, Austin, Texas 78711-3047, (512) 463-3368, e-mail address: http:/www.tbpc.state.tx.us. If subrecipients choose to use the Cooperative Purchasing Program, they will need documentation of annual fee payment.

§5.12. Equipment Purchases.

Equipment purchases with an acquisition cost of $5,000 or greater per unit for Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), and Weatherization Assistance Program (WAP) and $500 or greater for Emergency Shelter Grant Program (ESGP) require prior approval from the TDHCA Community Affairs Division before the purchase can take place.

§5.13. Bonding Requirements.

(a) The following requirements relate only to construction or facility improvements.

(1) For contracts exceeding $100,000 the Department may accept the bonding policy and requirements of the subrecipient, provided the Department has made a written finding that the Department is adequately protected.

(2) For contracts in excess of $100,000, and for which the subrecipient cannot make a determination that the Department's interest is adequately protected, a "bid guarantee" from each bidder equivalent to five percent of the bid price shall be requested. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. A bid bond in the form of all of the following may represent a "bid guarantee."

(A) A performance bond on the part of the subrecipient for 100% of the contract price. A "performance bond" is one executed in connection with a contract, to secure fulfillment of all subcontractors' obligations under such contract.

(B) A payment bond on the part of the subcontractor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(C) Where bonds are required, in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR, Part 223, "Surety Companies Doing Business with the United States."

(b) Cities and counties must comply with the bond requirements of Texas Civil Statutes, Articles 2252 and 5160, and Local Government Code §252.044 and §262.032, as applicable.

§5.14. Subrecipient Contract.

(a) Upon Board approval, the Department's Executive Director and subrecipients shall enter into and execute an agreement for the receipt of funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver modifications and/or amendments to the contract.

(b) Within sixty (60) days following the conclusion of a contract issued by the Department, the subrecipient shall provide a full accounting of funds expended under the terms of the contract.

(c) Failure of a subrecipient to provide an accounting of funds expended under the terms of the contract may be sufficient reason for the Department to deny any future contract to the subrecipient.

§5.15. Federal Funding Accountability and Transparency Act (FFATA).

All entities receiving funds of $25,000 or more must be registered in the federal Central Contractor Registration (CCR) and have a current Data Universal Numbering System (DUNS) number.

§5.16. Monitoring of Subrecipients.

(a) The Department's Community Affairs Division (CAD) is responsible for ensuring that the Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP), and Emergency Shelter Grant Program (ESGP) program activities are completed and that the funds are expended in accordance with the contract provisions and applicable State and Federal rules, regulations, policies, and related statutes. In order to ensure such, the Department will conduct monitoring reviews of the subrecipients following the requirements of §678B of PL 105-285 Subtitle B, §2605(B)(10) of PL 97-35, as amended, CFR 10 §440.23(d), and CFR 24 §576.61 and §576.57(f) and (g), respectively.

(1) CAD employs a subrecipient monitoring procedure that is based upon an assessment of associated risks. The factors may include but are not limited to the status of the most recent monitoring report, timeliness of grant reporting, results of the last on-site monitoring review, number and funding amount of Department funded contracts, final expenditure rate, and single audit status or other factors. Ranking of subrecipients will determine whether an on-site review or a desk review is completed unless Department management determines an on-site review is needed. CAD may conduct unannounced on-site

monitoring reviews of subrecipients identified as high risk, if deficiencies identified from prior monitoring activities persist or remain unresolved for an unreasonable period of time. In the event of reports of fraud and abuse or other extenuating circumstances the Department may make an unannounced on-site monitoring review.

(2) Follow-up reviews may be performed to ensure implementation of corrective action of subrecipients that failed to meet the goals, standards, and requirements established by the Department.

(3) A monitoring instrument is used to perform monitoring reviews. Support documentation is retained by the Department to verify: the achievement of performance goals; conduct of eligible activities; and compliance with other contractual regulatory provisions and financial accountability. Monitoring reviews of subrecipients also include reviewing annual financial reports and any related management letters and financial documents.

(4) Following the monitoring review, a monitoring report is prepared and submitted to the subrecipients outlining any administrative, program, and financial deficiencies. The monitoring report also includes notes, recommend improvements, corrective actions or a corrective action plan.

(A) Finding--The written description of a deficient condition which is significantly substandard according to the monitoring standards. Findings may also be deficiencies found with regard to compliance with program rules, required cost principles, federal, state and/or local laws, and generally accepted accounting procedures or Generally Accepted Accounting Principles. In general, findings require corrective action to create an acceptable level of risk for disbursement of funds. The description of a finding might include the cause and effect of the deficient condition.

(B) Recommended Improvement--A necessary improvement to program, operational, financial or administrative practices that may or may not be related to a substandard condition but through its application will lower risk factors and bring the affected area into a relatively improved condition. A recommended improvement will be made if a condition might lead to a finding but is itself not significant or sustained in nature. Recommended Improvements will be made to improve a weakness but not to request corrective actions.

(C) Note--An explanatory tool to further describe and clarify findings or recommended improvements. A note may also be used to include additional information related to the monitoring review but not related to a finding or recommended improvement.

(5) Subrecipients are required to have at a minimum the following documents available, and any other requested documents, for the monitoring review:

(A) Roster of staff (name, title, salary and status)--All Community Affairs programs;

(B) Current agency organization chart;

(C) List of Board of Directors to include: names, addresses and telephone numbers, tenure on the board, section represented by the board member, list of committees--CSBG and ESGP;

(D) Board election/selection materials--CSBG;

(E) Board minutes (previous six meetings) and attendance roster--CSBG and ESGP;

(F) List of neighborhood centers with names of staff--CSBG and CEAP;

(G) Personnel policies;

(H) Bylaws--CSBG and ESGP;

(I) Travel policies and records;

(J) Chart of accounts;

(K) Accounting records (journals/ledgers) and support documentation;

(L) Amount of Cash on Hand (at time of monitoring);

(M) Bank reconciliation records;

(N) Agency's proof of fidelity bond coverage;

(O) Documentation of match requirements--ESGP;

(P) Closeout data for prior program year--CEAP and WAP;

(Q) Access to client files and documentation of performance--All Community Affairs programs;

(R) Declaration of Income Statement (DIS) Policy/Procedure--All Community Affairs programs;

(S) Appeals Procedures--CEAP and WAP;

(T) Subcontract agreements with appropriate procurement packages (if applicable)--All Community Affairs programs;

(U) Procurement policy;

(V) Documentation of current contract inventory--All Community Affairs programs;

(W) Documentation of coordination with other local programs (including contact person and phone numbers)--CSBG;

(X) Copies of most recent monitoring reports and/or performance reviews of all programs administered by the organization;

(Y) Copy of the most recent Single Audit Report--Organizations that expend more than $500,000 in federal funds during a fiscal year must have a single audit conducted for that year (A-133 Subpart B.200). Organizations that do not exceed the $500,000 federal fund expenditure threshold are exempt from the single audit requirements. If an organization is not required to have a single audit performed, the organization must provide the end-of-the-year financial statements (balance sheet, income statement, and statement of cash flow); and

(Z) If applicable, documentation of the most recent Head Start Onsite Monitoring Document review, including results, responses, and current status--CSBG.

(b) Subrecipients are responsible for submitting their Single Audit Report within thirty (30) days of completion of their audit and no later than nine (9) months after the end of the audit period (fiscal year end) to the Department's Portfolio Management and Compliance Division as well as to the CA Division. Refer to 31 U.S.C. §7502.

(c) Monitoring reviews of subrecipients will include a review of the subrecipients annual financial reports and any related management letters and financial documents.

(d) If a subrecipient fails to comply with the requirements, rules, and regulations of the CSBG, CEAP, WAP, or ESGP programs, and in the event monitoring or other reliable sources reveal material deficiencies in performance, or if the subrecipient fails to correct any deficiency within the time allowed by federal or state law, the Department will apply one or more of the following sanctions:

(1) Deny the subrecipient's requests for advances and place it on a cost reimbursement method of payment until proof of compliance with the rules and regulations are received by the Department;

(2) Withhold all payments from the subrecipient (both reimbursements and advances) until proof of compliance with the rules and regulations are received by the Department;

(3) Suspend performance of the contract until proof of compliance with the rules and regulations are received by the Department;

(4) Elect not to provide future grant funds to the subrecipient until appropriate actions are taken to ensure compliance; or,

(5) Terminate the contract.

§5.17. Corrective Action and Contract Termination.

(a) Subrecipients that have entered into contract with the Department to administer programs are required to follow state and federal regulations and rules governing these programs.

(b) Except as expressly modified by law or the terms of a subrecipient's contract, the subrecipient shall comply with the cost principles and uniform administrative requirements set forth in the Uniform Grant and Contract Management Standards (UGMS), 1 TAC §§5.141, et seq.

(c) Adhering to the requirements governing each specific program administered by the Department, as needed, the Department may determine to proceed with the termination of a contract, in whole or in part, at any time the Department establishes there is good cause for termination.

(d) Corrective Action:

(1) The Community Affairs Division (CAD) will monitor and evaluate the effectiveness of subrecipient's performance and program compliance through on-site and desk monitoring as described in §5.15 of this chapter (relating to Federal Funding Accountability and Transparency Act (FFATA));

(2) To ensure subrecipients have systems in place and comply with program requirements and regulations, the Department will issue a written monitoring report to document deficiencies and recommend or require corrective action; and,

(3) Follow-up visits may be conducted to review and assess the efforts the subrecipient has made to correct previously noted deficiencies. Technical assistance and training may be provided to the subrecipient to address program deficiencies.

(e) Pursuant to §5.16 of this chapter (relating to Monitoring of Subrecipients), the Department may impose a cost reimbursement method of payment.

(1) The Department may withhold payment, reduce the allocation of funds (with the exception of Community Services Block Grant (CSBG) funds to eligible entities) or impose sanctions as deemed appropriate by the the Department Executive Director, at any time, if the Department identifies possible instances of fraud, abuse, fiscal mismanagement, or other serious deficiencies in the subrecipients' performance.

(2) Suspension or reduction of funds shall be a temporary measure pending either corrective action by the subrecipient or a decision by the Department to initiate proceedings for contract termination.

(f) Contract Termination. The Department may determine to proceed with the termination of a contract, in whole or in part, at any time the Department establishes there is good cause for termination. Such cause may include, but is not limited to, fraud, abuse, fiscal mismanagement, or other serious deficiencies in the subrecipient's performance. For CSBG contract termination procedures please refer to §5.206 of this chapter (relating to Termination and Reduction of Funding).

(g) Contract Close-out. When the Department moves to terminate a contract, the following procedures will be implemented.

(1) The Department will issue a termination letter to the subrecipient no less than thirty (30) days prior to terminating the contract. The Department may determine to take one of the following actions: suspend funds immediately; establish a cost reimbursement plan for closeout proceedings; or provide instructions to the subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the contract. The plan must identify the name and current job titles of staff that will perform the close-out and an estimated dollar amount to be incurred. The Department will respond within ten (10) working days from receipt of the plan.

(2) If the Department determines that cost reimbursement is an appropriate method of providing funds to accomplish closeout, the subrecipient will submit backup documentation for all current expenditures associated with the closeout. The required documentation will include, but not be limited to, the chart of accounts, detailed general ledger, revenue and expenditure statements, time sheets, payment vouchers and/or receipts, and bank reconciliations.

(3) No later than thirty (30) days after the contract is terminated, the Department will take a physical inventory of client files, including case management files, and will submit to the Department an inventory of equipment with a unit acquisition cost of $5,000 or greater for Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP) and CSBG or a unit acquisition cost of $500 or greater for ESGP.

(4) The terminated subrecipient will have thirty (30) days from the date of the physical inventory to copy all current client files. Client files must be boxed by county of origin. Current and active case management files also must be copied, inventoried, and boxed by county of origin.

(5) Within thirty (30) days following the subrecipient's due date for copying and boxing client files, Department staff will retrieve copied client files.

(6) The terminated subrecipient will prepare and submit no later than sixty (60) days from the date the contract is terminated, a final report (TDHCA Form 85) containing a full accounting of all funds expended under the contract.

(7) A final Monthly Financial Funding Programmatic Report for all remaining expenditures incurred during the close-out period must be received by the Department no later than sixty (60) days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The subrecipient will submit to the Department no later than sixty (60) days after the termination of the contract, an inventory (TDHCA Form 27) of the non-expendable personal property (as defined in Attachment N of the Uniform Grant Management Standards) acquired in whole or in part with funds received under the contract.

(9) The Department will transfer title to equipment having a unit acquisition cost (the net invoice unit price of an item of equipment) of:

(A) $5,000 or greater for CEAP, WAP, and CSBG; or,

(B) $500 or greater for ESGP to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove equipment covered by

(A) or (B) of this section within ninety (90) days following termination of the contract.

(10) Upon selection of a new service provider, the Department will transfer to the new provider client files and, as appropriate, equipment.

(11) As required by OMB Circular A-133, a current year Single Audit must be performed for all agencies that have exceeded the federal expenditure threshold of $500,000. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. The terminated subrecipient must have a binding contract with a CPA firm on or before the termination date of the contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than sixty (60) days from the date the Department determines the close-out is complete.

(12) Subrecipients shall submit within sixty (60) days after the date of the close-out process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the subrecipient. However, unless the Department authorizes an extension, the subrecipient must abide by the sixty (60) day contractual requirement of submitting all referenced reports and documentation to the Department.

§5.18. Information Technology Security Practices.

(a) Subrecipients are encouraged to follow the Information Technology Security Practices and Guidelines to help protect and control financial and performance data associated with the Texas Department of Housing and Community Affairs (TDHCA) programs.

(b) Information Technology Security Practices and Guidelines may be obtained by accessing the TDHCA Web site at www.tdhca.state.tx.us.

§5.19. Client Income Guidelines.

(a) The Department has defined eligibility for program assistance under the poverty income guidelines provided annually by the Secretary of the U.S. Department of Health and Human Services.

(b) The Department will use the following list of included and excluded income to determine eligibility for all programs.

(1) Included Income:

(A) Temporary Assistance for Needy Families (TANF);

(B) Money, wages and salaries before any deductions;

(C) Net receipts from non-farm or farm self-employment (receipts from a person's own business or from an owned or rented farm after deductions for business or farm expenses);

(D) Regular payments from social security;

(E) Railroad retirement;

(F) Unemployment compensation;

(G) Strike benefits from union funds;

(H) Worker's compensation;

(I) Training stipends;

(J) Alimony;

(K) Military family allotments;

(L) Private pensions;

(M) Government employee pensions (including military retirement pay);

(N) Regular insurance or annuity payments; and

(O) Dividends, interest, net rental income, net royalties, periodic receipts from estates or trusts; and net gambling or lottery winnings.

(2) Excluded Income:

(A) Social Security Disability Insurance (SSDI) payments;

(B) Supplemental Security Income (SSI) payments;

(C) Capital gains; any assets drawn down as withdrawals from a bank;

(D) The sale of property, a house, or a car;

(E) One-time payments from a welfare agency to a family or person who is in temporary financial difficulty;

(F) Tax refunds, gifts, loans, and lump-sum inheritances;

(G) One-time insurance payments, or compensation for injury;

(H) Non-cash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits;

(I) Food or housing received in lieu of wages;

(J) The value of food and fuel produced and consumed on farms;

(K) The imputed value of rent from owner-occupied non-farm or farm housing;

(L) Federal non-cash benefit programs as Medicare, Medicaid, Food Stamps, and school lunches;

(M) Housing assistance and combat zone pay to the military;

(N) Veterans (VA) Disability Payments;

(O) College scholarships, Pell and other grant sources, assistantships, fellowships and work study, VA Education Benefits (GI Bill); and

(P) Child support payments.

§5.20. Determining Income Eligibility.

(a) The U.S. Department of Health and Human Services (USHHS) annually provides poverty income guidelines for use in determining client eligibility. Community Affairs Division programs are required to follow these guidelines.

(b) The subrecipients shall establish the client eligibility level at 125% of the federal poverty level in effect at the time the client makes an application for services.

(c) To determine income eligibility for program services, subrecipients must base annualized eligibility determinations on household income from thirty (30) days prior to the date of application for assistance. Each subrecipient must maintain documentation of income from all sources for all household members for the entire thirty (30) day period prior to the date of application and multiply the monthly amount by twelve (12) to annualize income. Income documentation must be collected from all income sources for all household members 18 years and older for the entire thirty (30) day period.

(d) If proof of income is unavailable, the applicant must complete and sign a Department approved Declaration of Income Statement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804809
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.201 - 5.217

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter B, §§5.201 - 5.217 concerning Community Affairs Programs, Community Services Block Grant. The purpose of the new subchapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new section.

§5.201. Background.

(a) In addition to the following rules for the Community Services Block Grant (CSBG) program, the rules established in Subchapter A of this chapter also apply to the CSBG program. The CSBG Act was amended by the "Community Services Block Grant Amendments of 1994" and the Coats Human Services Reauthorization Act of 1998. The Secretary is authorized to establish a community services block grant program and make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(b) The Texas Legislature designated the Department as the lead agency for the administration of the CSBG program pursuant to Texas Government Code, §2306.092. CSBG funds will be made available to eligible entities to carry out the purposes of the CSBG program.

§5.202. Purpose and Goals.

Community Services Block Grant (CSBG) funds provide assistance to states and local communities, working through a network of community action agencies and other neighborhood-based organizations for the reduction of poverty, the revitalization of low-income communities, and the empowerment of low-income families and individuals in rural and urban areas to become fully self-sufficient (particularly families who are attempting to transition off a state program carried out under part A of title IV of the Social Security Act.)

§5.203. Distribution of CSBG Funds.

(a) The CSBG Act requires that no less than 90% of the state's allocation be allocated to eligible entities. The Department currently utilizes a multi-factor fund distribution formula to equitably provide CSBG funds throughout the state's 254 counties to the CSBG eligible entities. The formula incorporates the 2000 U.S. Census figures at 125% of poverty; a $50,000 base; a $150,000 floor (the minimum funding level); a 98% weighted factor for poverty population; and, a 2% weighted factor for the inverse ratio of population density.

(1) Each eligible entity receives a base amount of $50,000;

(2) The weighted factors of poverty population and population density are applied to the funds remaining after the base award funds have been distributed to each eligible entity;

(3) The Department then determines if any eligible entity is below the $150,000 floor after the base amount and weighted factors (poverty population and population density) have been applied, then the minimum floor amount is reserved for those entities below $150,000.

(4) The remaining funds are distributed to the remaining eligible entities. As was done with the initial run of the formula, each of the remaining eligible entities receives the base amount of $50,000 and then the weighted factors (poverty population and population density) are applied to determine the allocation amounts for eligible entities funded above the $150,000.

(b) Five percent (5%) of the Department's annual allocation of CSBG funds and any funds not spent as identified in the following subsection (c) of this section, may be expended for activities as per 42 U.S.C. §9907(b)(A) - (H) and activities that may include:

(1) the provision of training and technical assistance to CSBG eligible entities;

(2) services to low-income migrant seasonal farm worker and Native American populations;

(3) assisting CSBG eligible entities in responding to natural or man-made disasters;

(4) funding for innovative and demonstration projects that assist CSBG target population groups to overcome at least one of the barriers to attaining self-sufficiency; and

(5) other projects/initiatives, including state conference expenses. The Department may provide monetary awards to subrecipients for outstanding performance. To ensure consistent and comparable results, the process for monetary awards to CSBG subrecipients will be standardized.

(c) Up to five percent (5%) of the Department's annual allocation of CSBG funds will be used for administrative purposes consistent with state and federal law.

§5.204. Use of Funds.

(a) CSBG funds distributed to eligible entities for a fiscal year may be available for obligation during that fiscal year and the succeeding fiscal year. Eligible entities may use the funds for administrative support and/or for direct services such as: education, employment, housing, health care, nutrition, transportation, linkages with other service providers, youth programs, emergency services i.e., utilities, rent, mortgage, food, shelter, clothing etc. For additional requirements reference 42 U.S.C. §9908(b)(A)(i-vii) and Office of Management and Budget (OMB) Circulars A-122 and A-87.

(b) Utility and rent deposit refunds from vendors must be reimbursed to the subrecipient and not the client. Funds should be treated as program income.

§5.205. Limitations on Use of Funds.

Construction of Facilities. CSBG funds may not be used for the purchase, construction or improvement of land, or facilities as described in (42 U.S.C. §9918)(a)).

§5.206. Termination and Reduction of Funding.

(a) If the Department determines, on the basis of a final decision in a review pursuant to the CSBG Act, that an eligible entity fails to comply with the terms of an agreement or the state plan, to provide services under the CSBG Act or to meet appropriate standards, goals, and other requirements established by the Department (including performance objectives), the Department shall:

(1) inform the entity of the deficiency to be corrected;

(2) require the entity to correct the deficiency;

(3) offer training and technical assistance, if appropriate, to help correct the deficiency, and, as appropriate, prepare and submit to the Secretary a report describing the training and technical assistance offered; or if the Department determines that such training and technical assistance are not appropriate, prepare and submit to the Secretary a report stating the reasons for the determination and the reasons for proceeding with termination proceedings;

(4) At the discretion of the Department (taking into account the seriousness of the deficiency and the time reasonably required to correct the deficiency), the Department shall allow the entity to develop and implement, within sixty (60) days after being informed of the deficiency, a Quality Improvement Plan (QIP) to correct such deficiency within a reasonable period of time, as determined by the Department. No later than thirty (30) days after receiving from an eligible entity a proposed QIP, the Department shall either approve such proposed plan or specify the reasons why the proposed plan cannot be approved;

(5) If the Department does not accept the QIP, the Department, after providing adequate notice of impending termination proceedings and an opportunity for a hearing, may initiate proceedings to terminate or reduce the funding of a subrecipient; and

(6) If the Department has implemented sanctions against a subrecipient and the subrecipient has failed to comply with the QIP or a corrective action plan, the Department may request of the subrecipient's Board of Directors the voluntary relinquishment of the CSBG program and their designation as a CSBG eligible entity. If the subrecipient accepts to voluntarily relinquish the CSBG program, the Department will commence contract termination proceedings. If the subrecipient rejects voluntarily relinquishment of the CSBG program or the Department does not accept the subrecipient's QIP, the Department will initiate procedures for a hearing.

(A) Pursuant to the CSBG Act, the Department will provide notice and an opportunity for a hearing.

(B) The Department will select an Administrative Law Judge (ALJ) to oversee the proceedings of the hearing. The Department will coordinate establishing a date, time and hearing location with the ALJ and will provide adequate notice to the subrecipient.

(C) Upon receiving a favorable ruling from the ALJ, pursuant to 42 U.S.C. §9915, the Department will prepare correspondence to the U.S. Secretary of Health and Human Services (HHS) requesting the termination of the subrecipient as a CSBG eligible entity. Upon receiving a favorable ruling from HHS, the Department will initiate proceedings to terminate and close-out the contract.

(b) Any right or remedy given to the Department by this chapter does not preclude the existence of any other right or remedy, nor shall any action or lack of action by the Department in the exercise of any right or remedy be deemed a waiver of any other right or remedy.

§5.207. Subrecipient Performance.

(a) Budgets. CSBG eligible entities and any other funded organizations shall submit a budget to facilitate the contract execution process. A certification of board approval of CSBG budget form issued by the Department must also be submitted with planned budgets.

(b) Unexpended Funds. The Department reserves the right to deobligate funds.

(1) The U.S. Department of Health and Human Services Administration for Children and Families issues terms and conditions for receipt of funds under the CSBG. Subrecipients of CSBG funds will comply with the requirements of the terms and conditions of the CSBG award. Services must be provided on or before September 30th of the subsequent year and must be fully expended.

(2) The Coats Human Services Reauthorization Act of 1998, allows states to recapture unexpended CSBG funds in excess of 20% of the CSBG funds obligated to an eligible entity. This may be superseded by Congressional action in the appropriation process or by the terms and conditions issued by U.S. Health and Human Services in the CSBG award letter.

§5.208. Designation and Re-designation of Eligible Entities in Unserved Areas.

If any geographic area of the state ceases to be served by an eligible entity, the requirements of 42 U.S.C. §9909 will be followed.

§5.209. State Application and Plan.

(a) The Department submits to the Secretary every two years a state plan and a CSBG application. The Department holds public hearings in different areas of the state to solicit public comment on the intended use of CSBG funds. The Department will provide notice of the public hearings regarding the state plan no later than the 15th day before the date of the hearing and publish the draft state plan on the Department's web site at least 10 days before the first public hearing.

(b) Every two (2) years in conjunction with the development of the state plan, the Department submits the CSBG budget to the Texas

State Legislature for review during the legislative hearings, as part of the Legislative Appropriations Request (LAR) process.

§5.210. CSBG Needs Assessment and Community Action Plan.

(a) In accordance with the CSBG Act and §676 of the Act, the Department is required to secure a Community Action Plan on an annual basis from each CSBG eligible entity due on October 31st.

(b) Every five years, the CSBG Community Action Plan will include a community needs assessment from every CSBG Eligible Entity.

(c) The Community Action Plan shall at a minimum include a description of the delivery of services for the case management system and in accordance with the National Performance Indicators.

(d) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG subrecipients must complete an intake form which includes the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter, for all households receiving a community action service. A new CSBG intake form or a centralized intake form must be completed on an annual basis to coincide with the CSBG program year of January 1st through December 31st.

(e) Case Management.

(1) In keeping with the regulations issued under Title II, §676(b) State Application and Plan, the Department requires CSBG subrecipients to incorporate integrated case management systems in the administration of their CSBG program (Title II, §676(b)). Incorporating case management in the service delivery system and providing assistance that has a long-term impact on the client, such as enabling the client to move from poverty to self-sufficiency, to maintain stable families, and to revitalize the community, supports the requirements of §676(b). An integrated case management system, improves the overall provision of assistance and improves each subrecipient's ability to transition persons from poverty to self-sufficiency.

(2) Subrecipients must have in operation a case management program that has the following components:

(A) Intake Form;

(B) Pre-assessment to determine service needs, to determine the need for case management, and to determine which individuals/families to consider enrolling in case management program;

(C) Integrated assessment of individual/family service needs of those accepted into case management program;

(D) Development of case management service plan to meet goals and become self-sufficient;

(E) Provision of services and coordination of services to meet needs and achieve self-sufficiency;

(F) Monitoring and follow-up of participant's progress;

(G) Case closure, once individual has become self-sufficient; and

(H) Evaluation process to determine effectiveness of case management system.

(f) Organizations receiving state discretionary funds under §5.203(b) of this subchapter are not required to submit a Community Action Plan. All CSBG subrecipients must develop a performance statement which identifies the services, programs, and activities to be administered by the organization.

§5.211. Subrecipient Reporting Requirements.

(a) Monthly Performance and Expenditure Report. CSBG subrecipients must submit a monthly performance and expenditure report. Subrecipients shall submit the Monthly Funding/Financial/Performance Report (MFFPR) no later than the 20th day of the month after each month of the contract period. Even if a fund reimbursement is not being requested, an MFFPR must be submitted electronically on or before the twentieth (20th) day of each month of the grant period. A final MFFPR must be submitted within sixty (60) days after the CSBG contract ends. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us.

(b) Reporting. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report (also referred to as the CSBG National Survey). To comply with the requirements of §678E of the CSBG Act, all CSBG eligible entities and other organizations receiving CSBG funds are required to participate.

§5.212. CSBG Board of Directors Membership and Meeting Requirements for CSBG Eligible Entity's Tripartite Boards.

(a) General Board Requirements:

(1) The Coats Human Services Reauthorization Act (Public Law 105-285) addresses the CSBG program and requires that eligible entities administer the CSBG program through a tripartite board. The Act requires that governing boards or a governing body be involved in the development, planning, implementation, and evaluation of the programs serving the low-income sector. Also, the Texas Legislature, through §551.001(3) of the Texas Government Code, addresses specific requirements regarding meetings, meeting notices, and open meeting records through the Open Meetings Act (Texas Government Code, §§551.001, et seq.) and the Public Information Act (Texas Government Code, §§552, et seq.). State legislation has also defined as a governmental body, nonprofit corporation boards that are eligible to receive funds under the federal CSBG program and that are authorized by the state to serve a geographic area of the state.

(2) Federal requirements for establishing a tripartite board require board oversight responsibilities for public entities, which differ from requirements for private organizations. Where differences occur between private and public organizations, requirements for each entity have been noted in related sections of the rule.

(b) Each CSBG eligible entity shall comply with the provisions of this rule and if necessary, the eligible entity's by-laws shall be amended to reflect compliance with these requirements.

§5.213. Board Structure.

(a) Private nonprofit entities only, shall administer the CSBG program through a tripartite board that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities. The members of the board shall be selected by the private nonprofit entity and the board shall be composed so as to assure that the requirements of §676B(a)(2) of the CSBG Act are followed and are composed as follows:

(1) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The entity may allow governing officials of the political jurisdiction to select and/or recommend an elected or appointive official to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or al-

ternates may be counted in meeting the 1/3 requirement. Refer to subsection (d)(1)(B) of this section entitled "Permanent Representatives and Alternates" for related information;

(2) not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served; and each representative of low-income individuals and families selected to represent a specific neighborhood within a community under subsection (b)(1)(B) of this section, resides in the neighborhood represented by the member.

(3) the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(b) For public organizations to be considered to be an eligible entity for purposes of the CSBG Act, §676B(b), the entity shall administer the CSBG grant through tripartite boards as follows:

(1) A tripartite board, which shall have members selected by the organization and shall be composed so as to assure that not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members:

(A) are representative of low-income individuals and families in the neighborhood served;

(B) reside in the neighborhood served; and,

(C) are able to participate actively in the development, planning, implementation, and evaluation of programs funded under this chapter; or,

(D) If conditions in subparagraphs (A) - (C) of this paragraph are not utilized, then another mechanism specified by the state which meets the tripartite requirements may be used. Public organizations that choose to utilize another mechanism must submit to the Department, for review and approval, a description of the mechanism to be utilized to select low-income representatives. The mechanism must assure decision-making and participation by low-income individuals in the development, planning, implementation, and evaluation of programs funded under this chapter.

(2) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The entity may allow governing officials of the political jurisdiction to select and/or recommend an elected or appointive official to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Refer to §5.213(d)(1)(B) of this chapter, entitled "Permanent Representatives and Alternates" for related information.

(3) The remainder of the members are officials or members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(c) Eligible entities administering the Head Start Program must comply with, the Head Start Act (42 U.S.C. §9837) that requires the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act. Exceptions shall be made to the requirements of clauses (i) through (iv) of §642(c)(1) of the Head Start Act for members of a governing body when those members oversee a public entity and are selected to their positions with the public entity by public election or political appointment.

(d) Selection. As per §676B of the CSBG Act, Private nonprofit entities and public organizations have the responsibility for selection and composition of the board.

(1) Public Officials:

(A) Elected public officials or appointed public officials, selected to serve on the board, shall have either general governmental responsibilities or responsibilities which require them to deal with poverty-related issues. They may not be officials with only limited, specialized, or administrative responsibilities; and

(B) Permanent Representatives and Alternates. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board.

(i) Permanent Representatives. The public officials selected by a private nonprofit entity or public organization to serve on the board may each choose one permanent representative to serve on the board in a full-time capacity. The public officials of the public organization may choose a representative to serve on the board or other governmental body. The representative need not be a public official but shall have full authority to act for the public official at meetings of the board. Permanent representatives may hold an officer position on the board. If a permanent representative is not chosen, then an alternate may be designated by the public official selected to serve on the board. Alternates may not hold an officer position on the board.

(ii) Alternate Representatives. If the private nonprofit entity or public organization board chooses to allow alternates, the alternates for low-income representatives shall be elected at the same time and in the same manner as the board representative is elected to serve on the board. Alternates for representatives of private sector organizations may be designated to serve on the board and should be selected at the same time the board representative is selected. In the event that the board member or alternate ceases to be a member of the organization represented, he/she shall no longer be eligible to serve on the board. Alternates may not hold an officer position on the board.

(2) Low-Income Representatives:

(A) An essential objective of community action is participation by low-income individuals in the programs which affect their lives; therefore, the CSBG Act and its amendments require representation of low-income individuals on boards or state-specified governing bodies. The CSBG statute requires that not fewer than one-third of the members shall be are representatives of low-income individuals and families and that they shall be chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhoods served; and that each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member or;

(B) Board members representing low-income individuals and families must be selected in accordance with a democratic procedure. This procedure, as detailed in subparagraph (D) of this paragraph, may be either directly through election, public forum, or, if not possible, through a similar democratic process such as election to a position of responsibility in another significant service or community organization such as a school PTA, a faith-based organization leadership group; or an advisory board/governing council to another low-income service provider;

(C) Every effort should be made by the nonprofit entity or public organization to assure that low-income representatives are truly representative of current residents of the geographic area to be

served, including racial and ethnic composition, as determined by periodic selection or reselection by the community. "Current" should be defined by the recent or annual demographic changes as documented in the needs/community assessment. This does not preclude extended service of low-income community representatives on boards, but it does suggest that continued board participation of longer term members be revalidated and kept current through some form of democratic process; and

(D) The procedure used to select the low-income representative must be documented to demonstrate that a democratic selection process was used. Among the selection processes that may be utilized, either alone or in combination, are:

(i) Selection and elections, either within neighborhoods or within the community as a whole; at a meeting or conference, to which all neighborhood residents, and especially those who are poor, are openly invited;

(ii) Selection of representatives to a community-wide board by members of neighborhood or sub-area boards who are themselves selected by neighborhood or area residents;

(iii) Selection, on a small area basis (such as a city block); or

(iv) Selection of representatives by existing organizations whose membership is predominately composed of poor persons.

(3) Representatives of Private Groups and Interests:

(A) The private nonprofit entity or public organization shall select the remainder of persons to represent the private sector on the board or it may select private sector organizations from which representatives of the private sector organization would be chosen to serve on the board; and

(B) The individuals and/or organizations representing the private sector shall be selected in such a manner as to assure that the board will benefit from broad community involvement. The board composition for the private sector shall draw from officials or members of business, industry, labor, religious, law enforcement, education, school districts, representatives of education districts and other major groups and interests in the community served.

§5.214. Board--Administrative Requirements.

(a) Powers of the Board For Private Nonprofit Entities. The board is responsible for abiding by the terms of contracts and shall determine the policies of the agency to assure accountability for public funding. The board shall function as the organization's governing body with the same legal powers and responsibilities as the board of directors of any nonprofit corporation.

(b) Powers of the Board for Public Organizations. The powers, duties, and responsibilities of the board shall be determined by the governing officials of the public organization. The governing officials may establish:

(1) an advisory board, in which case the authority given to the advisory board depends on the powers delegated to it by the governing officials of the political subdivision; or

(2) a governing board, empowering the board of directors with substantive decision-making authority and delegating the powers, duties, and responsibilities to carry out its CSBG-supported contract and functions.

(c) Compensation. Board members are not entitled to compensation for their service on the board. Reimbursement of reasonable and necessary expenses incurred by a board member in carrying out his/her duties is allowed.

(d) Conflict of Interest. No board member may participate in the selection, award, or administration of a subcontract supported by CSBG funds if:

(1) the board member;

(2) any member of his/her immediate family (as defined in the CSBG contract);

(3) the board member's partner; or

(4) any organization which employs or is about to employ any of the above, has a financial interest in the firm or person selected to perform a subcontract. No employee of the local CSBG subrecipient nor of the Texas Department of Housing and Community Affairs may serve on the board.

§5.215. Board--Size.

(a) The board size shall be divisible by three (3).

(b) Board Service Limitations for Private Nonprofit Entities and Public Organizations Subrecipients boards may establish bylaws which allow for term limits and/or procedures for the removal of board members.

(c) Vacancies/Removal of Board Members.

(1) Vacancies. In no event shall the board allow 25% or more of either the public, private, or poverty sector board positions to remain vacant for more than ninety (90) days. CSBG subrecipients shall report the number of board vacancies by sector in their monthly performance reports. Compliance with the CSBG Act requirements for board membership is a condition for eligible entities to receive CSBG funding. There is no provision in the Act for a waiver or exception to these requirements.

(2) Removal of Board Members/Private Nonprofit Entities. Public officials or their representatives, may be removed from the board either by the board or by the entity that appointed them to serve on the board. Other members of the board may be removed by the board or pursuant to any procedure provided in the private nonprofit's by-laws.

(3) Removal of Board Members/Public Organizations. Board members may be removed from the board by the public organization or by the board if the board is so empowered by the public organization. The board may petition the public organization to remove a board member or the public organization may delegate the power of removal to the board.

§5.216. Board Responsibility.

(a) Tripartite boards have a fiduciary responsibility for the overall operation of the private nonprofit entity. Members are expected to carry out their duties as any reasonably prudent person would do.

(b) At a minimum, board members are expected to:

(1) Maintain regular attendance of board and committee meetings;

(2) Develop thorough familiarity with core agency information, such as the agency's bylaws, as appropriate, articles of incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;

(3) Exercise careful review of materials provided to the board;

(4) Make decisions based on sufficient information;

(5) Ensure that proper fiscal systems and controls, as well as a legal compliance system, are in place; and

(6) Maintain knowledge of all major actions taken by the agency.

(c) Individuals that agree to participate on a tripartite governing board, accept the responsibility to assure that the agency they represent continues to: assess and respond to the causes and conditions of poverty in their community, achieve anticipated family and community outcomes, and remains administratively and fiscally sound. Excessive absenteeism of board members compromises the mission and intent of the program.

(d) Residence Requirement:

(1) All board members shall reside within the subrecipient's CSBG service area designated by the CSBG contract. Board members should be selected so as to provide representation for all geographic areas within the designated service area; however, greater representation may be given on the board to areas with greater poverty population. Low-income representatives must reside in the area that they represent; and

(2) Subrecipients may request a waiver of the residency requirement to the Director of the Community Affairs Division for review for consideration and/or approval.

(e) Improperly Constituted Board. If the Department determines that a board of an eligible entity is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation and possible sanctions which may include: cost reimbursement method of payment; withholding of funds; contract suspension; and termination of funding.

§5.217. Board Meeting Requirements.

(a) The Board must follow the Texas Open Meetings Act, meet at least every 10 weeks and, must give each member a notice of meeting five (5) days in advance of the meeting.

(b) Open Meetings Training.

(1) Effective January 1, 2006, the 79th Texas Legislature established a state law §551.005 of the Texas Government Code requiring elected and appointed officials to receive training in Texas Open Government laws. The state law is in accordance to Texas Government Code, Title 5, §551.005 and §552.012. This mandate applies to the board of directors for CSBG eligible entities and requires that training is received within ninety (90) days of becoming a board member. As part of this requirement, the Office of the Attorney General has established and made available formal training to ensure government officials have a good command of open records and open meeting laws. To fulfill this requirement, the Office of the Attorney General offers free training videos which may be requested by accessing their website at www.oag.state.tx.us/opinopen/og_training.shtml or by calling 1-800-252-8011.

(2) Legislation requires open meetings training for public sector local officials; however, the Department recommends this training for all board members. Boards shall ensure that all members serving on the Board of Directors shall receive this training according to the deadlines described in subsection (b) of this section.

(3) The organization shall maintain a copy of the board training certificate issued to participants upon completion of the training.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER C. EMERGENCY SHELTER GRANTS PROGRAM (ESGP)

10 TAC §§5.301 - 5.311

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter C, §§5.301 - 5.311 concerning Community Affairs Programs, Emergency Shelter Grants Program. The purpose of the new subchapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of these new rules, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§5.301. Background.

(a) In addition to the following rules for the ESGP, the rules established in Subchapter A of this chapter also apply to the ESGP.

(b) ESGP was established by the Homeless Housing Act of 1986 in response to the growing issue of homelessness in the United States. In 1987, the ESG program was incorporated into Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378), now known as the McKinney-Vento Homeless Assistance Act.

(c) ESGP funds are federal funds awarded to the State of Texas by the U. S. Department of Housing and Urban Development (HUD). The Texas Legislature designated the Texas Department of Housing and Community Affairs (the Department) to administer this program pursuant to §2306.094, Texas Government Code. ESGP funds will be made available to eligible applicants to carry out the purpose of the ESGP based on a statewide competitive application process.

§5.302. Purpose and Goals.

(a) The ESGP funds are available for:

(1) the rehabilitation or conversion of buildings for use as emergency shelter for the homeless;

(2) the payment of certain operating expenses and essential services in connection with emergency shelters for the homeless; and

(3) homeless prevention activities.

(b) The program goal is to be the first step in a continuum of assistance to enable homeless individuals and families to move toward independent living as well as to prevent homelessness.

(c) The objectives of the ESGP shall be to:

(1) Help improve the quality of emergency shelters for the homeless;

(2) Help meet the costs of operating and maintaining emergency shelters;

(3) Provide essential services so that homeless individuals have access to the assistance they need to improve their situation; and

(4) Provide emergency intervention assistance to prevent homelessness.

§5.303. Distribution of ESGP Funds.

(a) All Texas counties fall within one of the 13 uniform state service regions. Funds are reserved for each region in direct proportion to the region's percentage of poverty population according to the decennial U.S. census.

(b) Applications are grouped by service region. Eligible applications compete only against other eligible applications from the same service region, with the highest ranking application being funded first.

(c) The Department will determine the number of applications which can be funded within each region based on the amount of funds available for distribution in each region. ESGP funds reserved for a particular region will be obligated to eligible applicant organizations within that region. If the region does not have enough responsive applications which meet the funding threshold, funds will be redistributed.

(d) Upon approval by the Department's Board of Directors, applicants receiving ESGP funds shall enter into and execute an agreement for the receipt of ESGP funds.

(1) Amendments. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver modifications and/or amendments to the ESGP contract.

(2) The Department reserves the right to deobligate funds.

(3) Faith-based subrecipients, as with all subrecipients funded under Housing and Urban Development (HUD)-funded programs, must serve all eligible beneficiaries without regard to religion.

(e) Allocation of Funds. The Department shall administer all federal ESGP funds provided to the state under the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378, now known as the McKinney-Vento Homeless Assistance Act in accordance with the HUD's final ESG rule, 24 CFR Part 576 and Chapter 2306, Texas Government Code, and the Department annual consolidated plan.

(f) The Department must obligate at least 95% of these funds for ESGP funded applicants.

(g) The Department may retain 5% for administration and may share a portion of its administrative funds with units of general local government (city or county) selected for funding.

(h) The Department will obligate funds within sixty-five (65) days of receiving the award letter from the U.S. Department of Housing and Urban Development.

§5.304. Use of Funds.

(a) Eligible Activities. ESGP funds are designed to address the immediate needs of homeless persons to assist their movement to permanent housing:

(1) ESGP funds may be utilized to assist individuals and families who would actually become or remain homeless without ESGP homelessness prevention assistance;

(2) ESGP funds cannot be utilized to care for or assist children in state custody; and

(3) The Department encourages that applications include an innovative approach to providing emergency shelter and/or transitional housing to homeless individuals and families. Transitional housing projects should be designed to provide housing and appropriate essential services to homeless persons in order to facilitate the movement of individuals or families to permanent housing within no more than 24 months. ESGP grant amounts may be used for one or more of the following activities in subsections (b) - (f) of this section:

(b) Operation administration may not exceed more than 10% of an applicant's ESGP budget (42 U.S.C. §11374(a)(3)) and may be requested for administrative salaries (including fringe benefits).

(1) Appropriate staff which may be charged as administrative staff are the executive director, program director, supervisors, administrative support staff, etc.

(2) Job descriptions for these positions are not required to be included in the ESGP application.

(c) Essential Services. ESGP legislation limits essential services to 30% of the total state allocation (24 CFR §576.3 and 42 U.S.C. §11374(a)(2)(b)).

(1) Essential services activities address the immediate needs of homeless individuals and enable homeless persons to become more independent and/or to secure permanent housing.

(A) Essential services may include direct client services concerned with employment, health, drug abuse prevention, and education, including but not limited to:

(i) assistance in obtaining permanent housing; medical and psychological counseling and supervision; employment counseling, job placement, and job training (including tuition and books);

(ii) nutritional counseling and the salary of food preparers (cooks);

(iii) substance abuse treatment and counseling;

(iv) assistance in obtaining other federal, state, and local assistance including mental health benefits, medical assistance, veteran's benefits, and income support assistance such as Supplemental Security Income, Temporary Assistance for Needy Families, and Food Stamps;

(v) other services such as childcare, food vouchers, client clothing, or medical assistance (doctor visits, prescriptions, eye glasses or other prostheses, etc.);

(vi) transportation costs directly associated with ESGP service delivery, such as bus tokens, bus fare, cab fare, airfare, salary of van driver, etc.; and

(vii) salary for staff whose sole duty is to work directly with clients to provide the above services.

(2) Staff salaries may include wages and fringe benefits; however, no administrative or supervisory salaries may be paid with essential services funds.

(3) ESGP funds may be used to provide essential services, if the agency received local funds (locally generated tax revenue) from a unit of local government in the past 12 months, only if the ESGP application includes a request for funds to provide essential services for a new service (24 CFR §576.21(b)).

(d) Maintenance, operation, and furnishings. ESGP funds may be used for maintenance, operation, furnishings, and equipment costs (24 CFR §576.21(3)).

(1) Maintenance costs include contract services for copier or security system maintenance, pest control, lawn care, contracted janitorial service, etc.

(2) Operation costs include administration, equipment, facility rent, utilities, internet service, and telephone; building maintenance and non-deferred repairs; food for shelter residents; vehicle maintenance, registration, repairs, and fuel; building or equipment insurance; fidelity bond coverage; office and maintenance supplies; single audit expenses (if required), staff mileage reimbursement (for travel relating to ESGP service delivery), and pre-award travel expenses (for successful applicants to attend an orientation workshop).

(A) Non-deferred repairs are items that break during the contract period, such as:

(i) repairing a window that is broken;

(ii) repairs due to water damage;

(iii) repairing a broken furnace; or

(iv) repairing an air conditioning unit.

(B) Deferred repairs, classified as rehabilitation activities, are items which are inoperable or broken and in need of replacement prior to the application period.

(C) Equipment may include computers, printers, software, refrigerator, stove, tools, vehicles, etc. All equipment with a useful life of more than one year and an acquisition cost of $500 or more must be included in a cumulative inventory report submitted to the Department each contract year. (Refer to Subchapter A, General Provisions §5.8 of this title (relating to Inventory Report).

(D) Subrecipients who participate in a local continuum of care may use ESGP funds to facilitate the required Homeless Management Information System (HMIS) which may include the purchase of software and/or annual access fees to facilitate data collection and reporting of client-level information.

(3) Furnishings may include beds, mattresses, linens, desks, tables, chairs, etc.

(e) Homelessness Prevention. ESGP legislation limits homelessness prevention to 30% of the total state allocation (42 U.S.C. §11374(a)).

(1) Homelessness prevention funds may be used to provide direct monetary assistance on behalf of individuals whose annual income is at or below the federal poverty guideline when the conditions referenced in 24 CFR §576.3 are met.

(A) The individual or family is unable to make the required payments due to a sudden reduction in income or a sudden increase in expenses, i.e. sudden reduction in income may result from an event that occurs no more than ninety (90) days prior to the date of application for ESGP services. Documentation should support the risk of becoming homeless such as an eviction notice or termination of utility service notice;

(B) The assistance is necessary to avoid the foreclosure, eviction, or termination of utility services (excluding telephone service); utility and rent deposit refunds from vendors must be reimbursed to the subrecipient and not the client. Funds should be treated as program income;

(C) There is reasonable prospect that the individual or family will be able to resume the payments within a reasonable period of time (determined by the applicant organization and used consistently among all clients); and

(D) The assistance does not replace funding for pre-existing homelessness prevention activities from any other sources.

(2) Homelessness prevention funds must be used to assist those individuals and families that would actually become or remain homeless without ESGP homelessness prevention assistance (24 CFR §576.3) and include:

(A) Short-term subsidies to help defray rent and utility arrearages for families that have received a notice of eviction, termination of utility services, or payments to prevent the transfers;

(B) Security deposits or first month's rent to enable a homeless family (or individuals in emergency/transitional housing) to acquire permanent housing;

(C) Programs to provide mediation for landlord/tenant disputes;

(D) Programs to provide legal services for the representation of indigent tenants in eviction proceedings;

(E) Payments to prevent foreclosure on a home; and

(F) Other innovative programs and activities designed to prevent the incidence of homelessness.

(3) Subrecipients are required to use the ESGP homelessness prevention application to determine the eligibility of individuals and families applying for ESGP homelessness prevention assistance. (Refer to the Department's website, www.tdhca.state.tx.us, for the homelessness prevention application.)

(f) Rehabilitation. Rehabilitation is defined as the labor, materials, tools, and other costs of improving buildings.

(1) Examples of allowable rehabilitation projects include, but are not limited to:

(A) accumulated deferred maintenance (replacing flooring);

(B) replacement of principle fixtures and components;

(C) improvements to increase energy efficiency (replacing a furnace or air conditioning unit); and

(D) structural changes necessary to make the facility accessible for persons with physical disabilities.

(2) Rehabilitation projects include deferred repairs for items that are inoperable or broken and in need of replacement prior to the submission of the ESGP application. Rehabilitation does not include non-deferred repairs.

(3) All rehabilitation activity funded through ESGP must occur within the existing structure, must not increase the square footage of the structure involved, and must comply with local government safety and sanitation requirements. (Refer to §504 of the Rehabilitation Act of 1973, as amended, as provided in 24 CFR §8.23(a) or §8.23(b)). Types of rehabilitation projects include conversion, major rehabilitation and renovation (24 CFR §576.3).

§5.305. Limitations on Use of Funds.

ESGP funds cannot be utilized for conversion, rehabilitation, renovation, or operation of permanent housing; acquisition of real property; new construction; addition of square footage, property clearance or demolition; direct payments to individuals; to support inherently religious activities such as worship, religious instruction, or proselytization; or to rehabilitate or repair buildings such as sanctuaries, chapels, and other rooms that a congregation uses as its principal place of worship.

§5.306. Eligible Entities.

(a) Eligible applicants are units of general local government and private nonprofit organizations (24 CFR §576.1 of the ESGP Act).

(b) The Department will accept collaborative applications. To be considered as a collaborative, the application must include two or more organizations that will use ESGP funds to provide services to the target population as part of a local continuum of care.

(c) If a unit of general local government applies for only one organization, this will not be considered a collaborative application.

§5.307. Application Requirements.

(a) Eligibility Documentation. The following information must be included in each ESGP application. Failure to provide this documentation will deem the application ineligible for funding.

(1) Participation of a homeless or formerly homeless individual on the board of directors or other equivalent policymaking entity of such recipient (42 U.S.C. §11375(d)). Applicants who have not previously received ESGP funds from the Department are exempt from the requirement, but must comply with the requirement prior to execution of a contract with the Department.

(2) Documentation as a §501(c) tax-exempt entity for all private nonprofit organizations.

(3) Local government approval from the city or county in which the project is located.

(b) Fiscal Accountability.

(1) Single Audit: An organization that spends more than $500,000 in federal funds during its fiscal year must have a single audit conducted for that year (A-133 Subpart B.200). ESGP subrecipients are responsible for submitting their single audit report within thirty (30) days of completion of their audit and no later than nine (9) months after the end of the audit period (fiscal year end) to the Department's Portfolio Management and Compliance Division, as well as to the Community Services Section of the Community Affairs Division. Refer to 31 U.S.C. §7502.

(2) Organizations that do not exceed the $500,000 federal fund expenditure threshold are exempt from the single audit requirements. If an organization is not required to have a single audit performed, the ESGP application must include the end-of-the-year financial statements (balance sheet, income statement, and statement of cash flow). All collaborative applications from non-profits must submit financial documentation for each organization in a collaborative.

(c) Match Requirements.

(1) ESGP subrecipients must match their award amount with an equal or greater amount of resources other than ESGP funds. (42 U.S.C. §11375(a)) (OMB Circular A-110 Subpart C_.23) Matching funds used for an ESGP project may not be used to match any other project or grant.

(2) Match resources will adhere to the requirements of OMB Circular A-110 _.23 and/or UGMS_.24 including:

(A) Donated Supplies: Donated goods such as clothing, furniture, equipment, etc.

(B) Cash Donations or Grants: Private donations or grants from foundations, nonprofits, or local, state, and federal sources.

(C) Value of Donated Building: The fair market value of a donated building in the year that it is donated. The building must be proposed for ESGP-related activities and currently must not be in use for these activities.

(D) Rent or Lease Value of a Building: Rent paid or would be paid for space currently used to provide services to the homeless.

(E) Salaries: Any staff salary paid with general operating funds or certain grant funds including but not limited to CSBG, Community Development Block Grant (CDBG), United Way, and Victims of Crime Act (VOCA). The position(s) used as match must be involved in ESGP-related activities and the hours utilized for match must be for hours worked for ESGP related activities.

(F) Volunteers: Time and services contributed by volunteers, with a value not to exceed federal regulations.

(d) Environmental Review Requirements for Rehabilitation Projects.

(1) The following federal regulations concerning environmental review are applicable to rehabilitation projects:

(A) 24 CFR Part 58

(B) 24 CFR §576.57(e) (Release of Funds)

(C) 24 CFR Part 35 (Lead Based Paint Hazard Reduction)

(2) All ESGP applications including a request for rehabilitation funds must include a Preliminary Environmental Review Checklist. For ESGP funds distributed by the state to units of general local government, the unit of general local government must assume the environmental responsibilities, and the state will be responsible for providing a release of funds in accordance with the requirements of 24 CFR Part 58.

(3) For funds distributed by the state to nonprofit organizations, the State must assume the environmental responsibilities, and Housing and Urban Development (HUD) will provide the release of funds in this instance.

(4) The Department may accept a previous environmental review if:

(A) the environmental review is not more than five (5) years old and no structural changes have occurred at the previously approved location;

(B) the certifying entity (local authority) provides documentation that no environmentally significant changes have occurred at the approved location since the review was done; and

(C) a copy of the environmental review is submitted as part of the ESGP application.

§5.308. Application Awards.

(a) Award Amounts:

(1) The annual application packet will specify the minimum and maximum for ESG program awards. As required in 24 CFR, Subpart C, §576.35, applicants will be notified of the Department's recommendation for funding; and

(2) Award limitations are based on the amount of ESGP funds estimated to be available to each region and the ESGP funding pattern utilized by the Department.

(b) Funded Projects:

(1) All projects should be planned for a maximum of twelve (12) months;

(2) Per HUD requirements, the Department will share a portion of the state's administrative funds with units of general local government (cities or counties) selected for ESGP funding. The amount shared will not exceed 4% of the subrecipient's ESGP award; and

(3) The Department reserves the right to negotiate the final grant amounts and local match with successful applicants. The Department may consider the amount of Housing and Urban Development (HUD) funds awarded to entitlement entities when making funding decisions to applicants that are a unit of general local government. This consideration does not apply to private nonprofit organizations located in ESGP entitlement cities or counties.

§5.309. Application Process.

(a) The Department will publish the ESGP application annually on the Department's website, www.tdhca.state.tx.us. The Department will also provide written notice to organizations regarding the ESGP application.

(b) To be considered for funding, an applicant must submit a completed application in accordance with application instructions issued annually in the ESGP Application notice.

§5.310. Application Review Process.

(a) Applications may be deemed ineligible for lack of response to Department ESGP monitoring report(s) and compliance and audit issues identified by the Department.

(b) Applicants not recommended for funding will be notified in writing no later than thirty (30) days from the date that the Department obligates funds.

(c) Applications recommended for funding will be presented to the board or its designee for approval, pending the availability of ESGP funds.

(d) Applicants not selected to receive ESGP funds may request a review of their application no later than thirty (30) days after the date of the written funding notification from the Department as per §1.7 of this title (relating to Staff Appeals Process).

§5.311. Reports.

(a) The ESGP contract requires subrecipients to submit the Monthly Funding/Financial/Performance Report (MFFPR) no later than the twentieth (20th) day of the month after each month of the contract period.

(b) Even if a fund reimbursement is not being requested, an MFFPR must be submitted electronically on or before the twentieth (20th) day of each month of the grant period. A final MFFPR must be submitted within 60 days after the ESGP contract ends.

(c) A user name and password are needed to access the reporting system to submit monthly reports. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us, under "Interactive" "Contractor Tools".

(d) Subrecipients shall submit, by the 30th day of the month, a Monthly Service Summary Report of ESGP clients reported during the prior month in the Homeless Management Information Systems (HMIS) database.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Michael Gerber
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Texas Department of Housing and Community Affairs
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SUBCHAPTER D. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§5.401 - 5.408, 5.421 - 5.426, 5.430 - 5.432

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter D, §§5.401 - 5.408, 5.421 - 5.426, and 5.430 - 5.432, concerning Community Affairs Programs, Comprehensive Energy Assistance Program. The purpose of the new Chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-

3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§5.401. Background.

The Comprehensive Energy Assistance Program (CEAP) is funded through the Low Income Home Energy Assistance Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, as amended). LIHEAP has been in existence since 1982. LIHEAP is a federally funded block grant program that is implemented to serve low income households who seek assistance for their home energy bills.

§5.402. Purpose and Goals.

The purpose of CEAP is to assist low-income households, particularly those with the lowest incomes, that pay a high proportion of household income for home energy, primarily in meeting their immediate home energy needs. The program encourages priority be given to those with the highest home energy needs, meaning low income households with a high energy burden and/or the presence of a "vulnerable" individual in the household, such as a young child, disabled person, or frail older individual. CEAP services include: energy education, needs assessment, budget counseling (as it pertains to energy needs), utility payment assistance and heating and cooling system replacement, repair or retrofit.

§5.403. Distribution of CEAP Funds.

(a) The Department distributes funds to subrecipients by an allocation formula.

(b) The formula allocates funds based on the number of low-income households in a service area and takes into account the special needs of individual service areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as follows:

(1) County Non-elderly Poverty Household Factor (weight of 40%) is defined by the Department as the number of Non-elderly Poverty Households in the County divided by the number of Non-elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor (weight of 40%) is defined by the Department as the number of Elderly Poverty Households in the County divided by the number of Elderly Poverty Households in the State; and

(3) County Inverse Poverty Household Density Factor (weight of 5%) is defined by the Department as:

(A) The number of Square Miles of the County divided by the number of Poverty Households of the County (equals the Inverse Poverty Household Density of the County); and

(B) Inverse Poverty Household Density of the County divided by the Sum of Inverse Household Densities.

(4) County Median Income Variance Factor (weight of 5%) is defined by the Department as:

(A) State Median Income minus the County Median Income (equals County Variance); and

(B) County Variance divided by sum of the State County Variances.

(5) County Weather Factor (weight of 10%) is defined by the Department as:

(A) County Heating Degree Days plus the County Cooling Degree Days, multiplied by the Poverty Households, divided by the sum of County Heating & Cooling Degree Days of Counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(c) All demographic factors are based on the decennial U.S. Census.

(d) Total sum of subsection (b)(1) - (5) of this section multiplied by total funds allocation equals the County's allocation of funds. The sum of the county allocations within each subrecipient service area equals the subrecipient's total allocation of funds.

§5.404. Subrecipient Eligibility.

(a) The Department shall ensure that: to the extent it is necessary to designate local administrative agencies in order to carry out the purposes of Title 42 U.S.C. §§8621, et seq; give special consideration to any local public or private nonprofit agency which was receiving Federal funds.

(1) The Department shall, before giving such special consideration, determine that the agency involved meets program and fiscal requirements established by the Department; and

(2) if there is no such agency because of any change in the assistance furnished to programs for economically disadvantaged persons, then the Department shall give special consideration in the designation of local administrative agencies to any successor agency which is operated in substantially the same manner as the predecessor agency which did receive funds for the fiscal year preceding the fiscal year for which the determination is made.

(b) The Department administers the program through the existing subrecipients that have demonstrated that they are operating the program in accordance with the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981 as amended (42 U.S.C. §§8621, et seq.), and the Department rules. If subrecipients are successfully administering the program, the Department may offer to renew the contract.

(c) When the Department determines that an organization is not administering the program satisfactorily, corrective actions are taken to remedy the problem. Thereafter, if subrecipient fails to administer the program correctly, the Department reassigns the service area or a portion to another existing subrecipient or conducts solicitation or selection of a new subrecipient in accordance with the Low-Income Home Energy Assistance Act of 1981.

§5.405. Subrecipient Requirements for Appeals Process for Applicants.

(a) Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) days of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to subrecipient within 10 days of receipt of the denial notice.

(b) The subrecipient who receives an appeal shall establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their client files.

(c) The subrecipient shall hold the appeal hearing within ten business days after the subrecipient received the appeal request from the applicant.

(d) The subrecipient shall record the hearing.

(e) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case.

(f) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(g) Subrecipient shall notify applicant of the decision in writing. The subrecipient shall mail the notification by close of business on the business day following the decision (1 day turn-around).

(h) If the applicant is not satisfied, they may further appeal the decision in writing to the Department within ten days of notification of an adverse decision.

(i) If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

(j) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary.

(k) The Department appeals committee shall decide the case and forward their recommendation to the Division Director for final concurrence.

(l) The Department will notify all parties in writing of its decision within 30 days of receipt of the appeal.

§5.406. Subrecipient Reporting Requirements.

(a) The subrecipient shall electronically submit to the Department a monthly Funding Report of all expenditure of funds, request for advance or reimbursement, and a monthly performance report no later than fifteen (15) days after the end of each month.

(b) The subrecipient shall electronically submit to the Department no later than sixty (60) days after the end of the subrecipient contract term a final expenditure or reimbursement and programmatic report utilizing the Funding Report.

(c) The subrecipient shall submit to the Department no later than sixty (60) days after the end of the contract term an inventory of all vehicles, tools, and equipment with a unit acquisition cost of $5,000 or more and a useful life of more than one year, if purchased in whole or in part with CEAP funds.

(d) The subrecipient shall submit other reports, data, and information on the performance of the CEAP program activities as required by the Department.

§5.407. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

(a) The subrecipients shall set the client income eligibility level at or below 125% of the federal poverty level in effect at the time the client makes an application for services.

(b) Subrecipient shall determine client income. The Department will provide definition of income lists to determine total household income. The lists contain income inclusions and exclusions and are located in §5.19 of this chapter (relating to Client Income Guidelines).

(c) Subrecipients shall base annualized eligibility determinations on household income from the 30 day period prior to the date of application for assistance. Each subrecipient shall document and retain proof of income from all sources for all household members 18 years and older for the entire 30-day period prior to the date of application and multiply by twelve (12) to annualize income.

(d) In the case of migrant, or seasonal workers, or similarly situated workers, a longer period than 30 days may be used for annualizing income.

(e) If proof of income is unavailable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. In developing the policy and procedure, subrecipients shall give consideration to limiting the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory, part-time, temporary, self-employed or seasonal in nature. To ensure limited use, the Department will review the written policy and its use during on-site monitoring visits.

(f) Social security numbers are not required for applicants for CEAP.

(g) Proof of citizenship is not required for CEAP.

(h) The subrecipients shall establish priority criteria to serve persons in households who are particularly vulnerable such as the elderly, persons with disabilities, families with young children, high residential energy users, and households with high energy burden. High residential energy users and households with high energy burden are defined as follows:

(1) Households with Energy Burden which exceeds the median energy burden of income-eligible households characterized by the Department as experiencing high energy burden. The Department calculates energy burden by dividing home energy costs by the household's gross income.

(2) Households with annual energy expenditures which exceed the median home expenditures for income-eligible households are characterized by the Department as high energy consumers.

(i) Homeowners and renters will be treated equitably under all programs funded in whole or in part from LIHEAP funds. For those renters who pay heating and/or cooling bills as part of their rent, the subrecipient shall make special efforts to determine the portion of the rent that constitutes the fuel heating and/or cooling payment. If "sub metering" is not available, the subrecipient shall exercise care when negotiating with the landlords so the cost of utilities quoted is in line with the consumption for similar residents of the community. If the subrecipient pays the landlord, then the landlord shall furnish evidence that he/she has paid the bill and the amount of assistance must be deducted from the rent, if the utility payment is not stated separately from the rent. An agreement stating the terms of the payment negotiations must be signed by the landlord.

(j) A household unit cannot be served, if the meter is utilized by another household.

§5.408. Service Delivery Plan.

Subrecipients are required to submit on an annual basis a Department formatted Service Delivery Plan, which includes information on how they plan to implement CEAP in their service area. Service Delivery Plan format can be found on the Department's website.

§5.421. Client Education.

The subrecipients must provide an energy-related needs assessment and referrals, budget counseling, and energy conservation education to each CEAP client. Subrecipients may provide education to identify energy waste, manage household energy use, and strategies to promote energy savings. Subrecipients are encouraged to use oral, written, and visual educational materials.

§5.422. General Assistance and Benefit Levels.

(a) Subrecipients shall not discourage anyone from applying for CEAP assistance. Subrecipients shall provide all potential clients with opportunity to apply for LIHEAP programs.

(b) CEAP provides assistance to targeted beneficiaries being households with low incomes at or below 125% of the Federal Poverty Level, with priority given to the elderly, persons with disabilities, families with young children; households with the highest energy costs or needs in relation to income, and households with high energy consumption.

(c) CEAP includes activities, as defined in Assurances 1-16 in Title XXVI of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended; such as education; and financial assistance to help very low- and extremely low-income consumers reduce their utility bills to an affordable level. CEAP services include utility payment assistance; heating and cooling system replacement, repair, and/or retrofit; energy education; and budget counseling.

(d) Sliding scale benefit for all CEAP components:

(1) Benefit determinations are based on the household's income, the household size, the energy cost and/or the need of the household, and the availability of funds.

(2) Energy assistance benefit determinations will use the following sliding scale (Except Heating and Cooling System Replacement, Repair and/or Retrofit Component):

(A) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,200.

(B) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,100.

(C) Households with Incomes of 76% to 125% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,000.

(D) The Heating and Cooling System Replacement, Repair, and/or Retrofit Component maximum household benefit limit is $4,000.

(e) Subrecipient shall not establish lower local limits of assistance for any component.

(f) Total maximum possible annual household benefit (all components combined) equals $7,600.

(g) Subrecipient shall determine client eligibility for utility payments and/or retrofit based on the agency's household priority rating system and household's income as a percent of poverty.

(h) Subrecipients shall provide only the following types of assistance with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services for past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance;

(2) Payment to vendors--only one energy bill payment per month as required by component;

(3) Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

(4) Energy assistance to low-income elderly and disabled individuals most vulnerable to high cost of energy for heating and cooling needs of the residence;

(5) Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or when the water bill is an inseparable part of a utility bill. As a part of the intake process, outreach, and coordination, the subrecipient shall confirm that a client owns an operational evaporative cooler and has used it to cool the dwelling within sixty (60) days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill. Documentation from vendor is required. Whenever possible, subrecipient shall negotiate with the utility providers to pay only the "home energy"--heating and cooling--portion of the bill;

(6) Energy bills already paid by householders may not be reimbursed by the program;

(7) Payment of reconnection fees in line with the registered tariff filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

(8) Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipients shall not pay such security deposits that the energy provider will eventually return to the client;

(9) While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct LIHEAP payments from the Subrecipient;

(10) Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating household of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of client is deducted from client's rent; and

(11) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow LIHEAP expenditures to pay deposits, except as noted in paragraph (7) of this subsection. Advance payments may not exceed an estimated two months' billings. Funds for the Texas CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (i.e., vehicle fuel), income assistance, or to pay for penalties or fines assessed to clients.

§5.423. Energy Crisis Component.

(a) A bona fide energy crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages have depleted or will deplete household financial resources and/or have created problems in meeting basic household expenses, particularly bills for energy so as to constitute a threat to the

well-being of the household, particularly the elderly, the disabled, or very young children.

(b) A utility disconnection notice may constitute an energy crisis, if client demonstrates a history of good faith in paying prior utility bills.

(c) Energy Crisis assistance for one household cannot exceed the maximum allowable benefit level in one year. Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis. If the client's crisis requires more than the household limit to resolve, it exceeds the scope of this program. If crisis exceeds the household limit, subrecipient may pay up to the household limit but the rest of the bill will have to be paid from other funds to resolve the crisis. Payments may not exceed client's actual utility bill. The assistance must result in resolution of the crisis.

(d) Where necessary to prevent undue hardships from a qualified energy crisis, subrecipients may directly issue vouchers to provide:

(1) Temporary shelter not to exceed the annual household expenditure limit for the duration of the contract period in the limited instances that inoperable heating/cooling appliances or supply of power to the dwelling is disrupted--causing temporary evacuation;

(2) Emergency deliveries of fuel up to 100 gallons per crisis per household, at the prevailing price. This benefit may include coverage for safety precautions--up to the maximum household benefit;

(3) Purchase of portable heating/cooling units (portable electric heaters are allowable only as a last resort) not to exceed household benefit limit during the contract period. Portable air conditioning and heating units may be purchased only in situations that threaten the life of the client;

(4) Subrecipient shall meet local energy crisis criteria prior to purchasing portable units for clients;

(5) Subrecipient shall maintain in the client file documentation of any special situation affecting client eligibility. For a client to qualify to receive a portable air conditioner or heater to protect life of household occupants, the subrecipient's client file must contain documentation from a medical professional, stating that a health condition of household occupant requires such climate control; and

(6) Portable heating/cooling units must meet Energy Star® or International Residential Code (IRC) compliant.

(e) Crisis funds, whether for emergency fuel deliveries, purchase of portable heating/cooling units, or temporary shelter, shall be considered part of the total maximum household allowable assistance.

(f) When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for the following:

(1) Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been destroyed or damaged, i.e., placing people in settings to preserve health and safety and to move them away from the crisis situation;

(2) Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

(3) Utility reconnection costs;

(4) Repair or replacement costs for furnaces and air conditioners;

(5) Insulation repair;

(6) Coats and blankets, as tangible benefits to keep individuals warm;

(7) Crisis payments for utilities and utility deposits; and

(8) Purchase of fans, air conditioners and generators.

(g) Time Limits for Assistance--Subrecipients ensure that for clients who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the energy crisis shall be provided within a 48 hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process.

(h) Subrecipients maintain written documentation in client files showing crises resolved within appropriate timeframes. The Department disallows improperly documented expenditures.

§5.424. Co-Payment Component.

(a) Subrecipients use home energy payments, energy conservation tips, participation by utilities, and coordination with other services to assist low-income households to reduce their home energy needs.

(b) Subrecipients make payments directly to vendors on behalf of participating households. Participating households make co-payments while participating in the program.

(c) Subrecipients shall calculate payments based on a sliding scale benefit structure.

(d) First payment of co-payment plan may include 100% of a utility bill--including arrears--or an appropriate percentage determined by the subrecipient as detailed in the Service Delivery Plan.

(e) A household's participation in the program may last from three to twelve months. Early termination may result if client fails to meet the provisions of the client service agreement.

(f) If a co-payment client's assistance period extends beyond the end of a program year, that client must re-apply for eligibility certification to continue receiving assistance.

(g) Subrecipient shall provide energy conservation education and referrals.

§5.425. Elderly and Disabled Component.

(a) Elderly households include at least one member age 60 or above. Disabled households include least one member living with a disability. Documentation of disability, (i.e. Social Security, Supplemental Security Income statement, doctor's letter) kept in client file will validate eligibility.

(b) Subrecipients make utility payments on behalf of elderly and disabled persons based on the previous 12 month's home energy consumption history, including allowances for cost inflation. In the absence of an available home energy consumption history, subrecipient may base payments on current program year's bill. Subrecipients note such exceptions in client files. Benefit amounts exceeding the actual bill shall be treated as a credit with the utility company for the client.

(c) Elderly and/or disabled clients may receive benefits to cover up to 100% of the four highest remaining bills within the contract year as long as the cost does not exceed the maximum annual benefit.

(d) The Department requires Subrecipients to expend a minimum of 10% of their Direct Service funds in the Elderly/Disabled Component.

§5.426. Heating and Cooling Component.

(a) The priority factors other than income eligibility for heating/cooling assistance include the degree of energy burden and household needs. Equipment replacement or repair under this component must reduce energy consumption and energy burden. "Household energy need" takes into account the unique situation of such household that results from having members of vulnerable populations, including children under the age of six, disabled individuals, and older individuals. The Department defines the household's energy need as the requirement for energy used to heat and/or cool the dwelling unit, as well as energy required to heat water and refrigerate food.

(b) Equipment repair and replacement targets households with high energy burden, or equipment unsafe or inadequate to protect occupants from extreme temperatures. This component reduces clients' energy burden by reducing excess demand from inefficient heating and cooling appliances. Questionably high energy bills during the heating or cooling season may indicate the need for an assessment of the condition of all major heating and cooling appliances in the client's home. An energy assessment of the home demonstrates whether or not the expected savings from repair or replacement of equipment will exceed the cost and will reduce energy consumption. Appliances consuming the most energy receive highest priority. Estimated repair cost exceeding 60% of estimated replacement cost justifies replacement.

(c) Subrecipients must conduct whole house assessments on all eligible heating and cooling appliances. Subrecipients must incorporate the appliance replacement protocols and tools available on the Department website, for window units, water heaters, and refrigerators on all applicable appliances in the household. Printed results from the use of these tools must be placed in the client files and be available for review.

(d) Household appliances assessed for condition (health and safety) and efficiency may include any home heating or cooling appliances and propane tanks. The Program allows replacement of evaporative coolers with refrigerated air only for substantiated medical reasons. Subrecipients shall replace appliances with Energy Star® rated equipment or IRC compliant appliances.

(e) Acceptable assessments for appliances under consideration for repair, replacement or retrofit with CEAP funds may be considered valid for one (1) year from the date of assessment. While subrecipients must re-certify income eligibility, the previously obtained assessment would remain valid. Should it appear that appliances previously assessed that did not require repair, replacement, or retrofit at the time of the assessment had deteriorated, a new assessment could be performed on only the applicable appliances.

(f) Households that contain both evaporative coolers and refrigerated air must be assessed in order to make the household most energy efficient. When both units need replacement consideration must be based on what is most energy efficient. Special consideration may be given to climate area and medical need. Without medical documentation a waiver may be granted by the Department.

(g) Heating and cooling assessments may be charged to the Heating and Cooling Component on a per household basis. If the assessment cost is charged to the Heating and Cooling Component, the cost must be counted toward the household benefit of $4,000.

(h) All replacement units must meet Energy Star or IRC compliant and must result in energy savings for the client. Heating and cooling funds may pay for zoning off a room in which the client spends a majority of time at home, incidental to the above improvements, if necessary to conserve conditioned air. In order to use heating and cooling funds for a room zone-off, the household must also be receiving a repair, replacement, or retrofit of a space heating or cooling unit.

(i) This component may be used to purchase, lease, or repair butane or propane tanks as well as the residential lines associated with the tanks or natural gas lines of the dwelling not to exceed the household's maximum allowable assistance and only if such service ensures the flow of energy necessary for heating and or cooling the household.

(j) This component may be used to purchase or repair of residential electric lines, not to exceed household's maximum allowable assistance and only if such service ensures the flow of energy necessary for heating and cooling the household.

(k) The Department requires Subrecipients to expend a minimum of 10% of their Direct Service funds in the Heating and Cooling Component.

§5.430. Allowable Subrecipient Administrative, Assurance 16 Activities, and Direct Services Support Expenditures.

(a) Allowable Administrative Costs for administrative activities may include planning, budgeting and accounting; establishing and directing policies, goals, and objectives, not unique to the mission and goals of LIHEAP. Subrecipients earn administrative budget share based on expenditure of direct services funds. The Department calculates funds available for subrecipient administrative activities as a percentage of Direct Services expenditures.

(b) Allowable Assurance 16 Activities costs may include services that encourage and enable households to reduce their home energy needs and thereby the need for energy assistance, including needs assessments, counseling, and assistance with energy vendors.

(c) Allowable Expenditures under Direct Services Support may include client intake, salaries, fringe benefits, and travel expenditures of staff when conducting outreach to eligible households; material and printing costs associated with outreach and targeting to eligible households.

(d) Direct Services Support and Assurance 16 Activities do not include computer purchases and related costs. These belong to Administration. Time/Expenditure Allocation for subrecipients shall demonstrate and document that they separately allocated the appropriate share of Direct Services Support/Assurance 16 Activities time and expenditures to both outreach and targeting.

(e) The Department and its subrecipients use the Uniform Grant Management Standards, OMB Circular A-87 for local governments or OMB Circular A-122 for non-profits for determination of allowable and allocable costs.

(f) To ensure fiscal compliance for this program, the Department may at the minimum use the following fiscal controls:

(1) review annual audits;

(2) monitor fiscal records; and

(3) review Monthly Expenditure and Performance Reports.

(g) The Department staff may monitor LIHEAP programs through monthly performance reports and periodic on-site visits using a standard monitoring instrument (copy available on the Department's website) for each program, designed to identify the agency's strengths and weaknesses. A risk assessment process will guide scheduling of visits to ensure that agencies ranking highest in risk will be monitored first.

(h) The Department and its subrecipients shall cooperate in all audits and maintain records in acceptable format for audit purposes and will cooperate with any state or federal investigations.

§5.431. Payments to Subcontractors and Vendors.

(a) A Department approved bi-annual vendor agreement, is required to be implemented by the subrecipient and shall contain assurances as to fair billing practices, delivery procedures, and pricing procedures for business transactions involving LIHEAP recipients. These agreements are subject to monitoring procedures performed by the Department staff.

(b) Subrecipient shall maintain proof of payment to subcontractors and vendors as required by OMB Circulars.

(c) The subrecipients shall notify each participating household of the amount of assistance paid on its behalf. Subrecipient shall document this notification.

(d) The vendor payment method will be used by subrecipients for CEAP components. Subrecipient shall not make cash payments directly to eligible household for any of the CEAP components.

§5.432. Outreach, Accessibility, and Coordination.

(a) The Department may continue to develop interagency collaborations with other low-income program offices and energy providers to perform outreach to targeted groups.

(b) Subrecipients shall conduct outreach activities.

(c) Subrecipients shall accept applications at sites that are geographically accessible to all households requesting assistance.

(d) Outreach activities may include:

(1) providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(2) distributing posters/flyers and other informational materials at local and county social service agencies, offices of aging, Social Security offices, etc.;

(3) providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(4) coordinating with other low-income services to provide LIHEAP information in conjunction with other programs;

(5) providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(6) providing LIHEAP applications, forms, and energy education materials in English and/or Spanish (or other appropriate language);

(7) working with energy vendors in identifying potential applicants;

(8) assisting applicants to gather needed documentation; and

(9) mailing information and applications.

(e) Subrecipients shall coordinate with other social service agencies through cooperative agreements to provide services to client households. Cooperative agreements must clarify procedures, roles, and responsibilities of all involved entities.

(f) Subrecipients shall coordinate with other energy related programs. Specifically, subrecipient shall make documented referrals to the local WAP subrecipient.

(g) Subrecipients shall coordinate with local energy vendors to arrange for arrearage reduction, reasonably reduced payment schedules, or cost reductions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804813
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER E. WEATHERIZATION ASSISTANCE PROGRAM GENERAL

10 TAC §§5.501 - 5.508, 5.521 - 5.532

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter E, §§5.501 - 5.508 and 5.521 - 5.532, concerning Community Affairs Programs, Weatherization Assistance Program General. The purpose of the new Chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§5.501. Background.

The Weatherization Assistance Program was established by the Energy Conservation in Existing Buildings Act of 1976, as amended 42 U.S.C. §§6851, et seq. The Department funds the Weatherization Programs through the Department of Energy Weatherization Assistance Program

(DOE-WAP) which is funded through the U.S. Department of Energy Weatherization Assistance Program for Low Income Persons grant and the Low Income Home Energy Assistance Program Weatherization Assistance Program (LIHEAP-WAP) which is funded through the U.S. Department of Health and Human Services' Low-Income Home Energy Assistance Program (LIHEAP) grant.

§5.502. Purpose and Goals.

(a) DOE-WAP and LIHEAP-WAP offers grants to community action agencies, nonprofits, and units of local government with targeted beneficiaries being households with low incomes, with priority given to the elderly; persons with disabilities; families with young children; households with the highest energy costs or needs in relation to income; and households with high energy consumption. In addition to meeting the income-eligibility criteria, the weatherization measures to be installed must meet specific energy-savings goals.

(b) The programs fund the installation of weatherization materials and provide energy conservation education. The program helps to control energy costs to ensure a healthy and safe living environment.

(c) The Department shall administer and implement the DOE-WAP program in accordance with DOE rules (10 CFR Part 440). The Department shall administer and implement the LIHEAP-WAP program in accordance with a combination of LIHEAP and DOE rules. LIHEAP weatherization measures may be leveraged with DOE weatherization measures.

§5.503. Distribution of WAP Funds.

(a) The Department distributes funds to subrecipients by an allocation formula.

(b) The allocation formula allocates funds based on the number of low-income households in a service area and takes into account the special needs of individual service areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as follows:

(1) County Non-elderly Poverty Household Factor is defined as the number of Non-elderly Poverty Households in the County divided by the number of Non-elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor is defined as the number of Elderly Poverty Households in the County divided by the number of Elderly Poverty Households in the State;

(3) County Inverse Poverty Household Density Factor is defined as:

(A) The number of Square Miles of the County divided by the number of Poverty Households of the County (equals the Inverse Poverty Household Density of the County); and

(B) Inverse Poverty Household Density of the County divided by the Sum of Inverse Household Densities.

(4) County Median Income Variance Factor is defined as:

(A) State Median Income minus the County Median Income (equals County Variance); and

(B) County Variance divided by sum of the State County Variances;

(5) County Weather Factor is defined as:

(A) County Heating Degree Days plus the County Cooling Degree Days, multiplied by the Poverty Households, divided by the sum of County Heating & Cooling Degree Days of Counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(C) The five factors carry the following weights in the allocation formula: number of non-elderly poverty households (40%), number of poverty households with at least one member who is 65 years of age or older (40%), household density as an inverse ratio (5%), the median income of the county (5%), and a weather factor based on Heating Degree Days and Cooling Degree Days (10%). All demographic factors are based on the 2000 U.S. Census. The formula is as follows:

(i) County Non-elderly Poverty Household Factor (0.40) plus;

(ii) County Elderly Poverty Household Factor (0.40) plus;

(iii) County Inverse Poverty Household Density Factor (0.05) plus;

(iv) County Median Income Variance Factor (0.05) plus;

(v) County Weather Factor (0.10);

(vi) Total sum of clauses (i) - (v) of this subparagraph multiplied by total funds allocation equals the County's allocation of funds.

(vii) The sum of the county allocation within each subrecipient service area equals the subrecipient's total allocation of funds.

§5.504. Subrecipient Eligibility.

(a) The Department administers the DOE-WAP program through subrecipients in accordance with 10 CFR §440.15 and Chapter 5 of this title.

(b) The Department administers the LIHEAP-WAP program through subrecipients in accordance with the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981 as amended (42 U.S.C. §§6861, et seq.), and in accordance with 10 CFR §440.15 and Chapter 5 of this title.

§5.505. Subrecipient Requirements for Appeals Process for Applicants.

(a) Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) days of the adverse determination. If the denial is for any reason other than DOE reweatherization, as specified in 10 CFR §440, the subrecipient will notify the applicant of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial. The applicants wishing to appeal a decision must provide written notice to subrecipient within 10 days of receipt of the denial notice.

(b) The subrecipient who receives an appeal shall establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their client files.

(c) The subrecipient shall hold the appeal hearing within ten business days after the subrecipient received the appeal request from the applicant.

(d) The subrecipient shall record the hearing.

(e) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case.

(f) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(g) Subrecipient shall notify applicant of the decision in writing. The subrecipient shall mail the notification by close of business on the business day following the decision (1 day turn-around).

(h) If the applicant is not satisfied, they may further appeal the decision in writing to the Department within ten days of notification of an adverse decision.

(i) If client appeals to the Department, the subrecipient must retain the maximum allowable cost per unit until the Department renders a decision.

(j) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary.

(k) The Department appeals committee shall decide the case and forward their recommendation to the Division Director for final concurrence.

(l) The Department will notify all parties in writing of its decision within 30 days of receipt of the appeal.

§5.506. Subrecipient Reporting Requirements.

(a) The subrecipient shall electronically submit to the Department a monthly Funding Report of all expenditure of funds, request for advance or reimbursement, and a monthly performance report no later than fifteen (15) days after the end of each month.

(b) The subrecipient shall electronically submit to the Department no later than sixty (60) days after the end of the subrecipient contract term a final expenditure or reimbursement and programmatic report utilizing the Funding Report.

(c) The subrecipient shall submit to the Department no later than sixty (60) days after the end of the contract term an inventory of all vehicles, tools, and equipment with a unit acquisition cost of $5,000 or more and a useful life of more than one year, if purchased in whole or in part with DOE and LIHEAP-WAP funds.

(d) The subrecipient shall submit other reports, data, and information on the performance of the DOE and LIHEAP-WAP program activities as required by DOE pursuant to 10 CFR §440.25 or by the Department.

§5.507. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

(a) Dwelling units that contain household members who receive Social Security Disability Insurance (SSDI) only are not automatically eligible.

(b) The subrecipients shall establish eligibility and priorities criteria to increase the energy efficiency of dwellings owned or occupied by low-income persons who are particularly vulnerable such as the elderly, persons with disabilities, families with young children, high residential energy users, and households with high energy burden. High residential energy users and households with high energy burden are defined as follows:

(1) Households with Energy Burden which exceeds 11% of gross income are characterized by the Department as high energy burden households. The Department calculates energy burden by dividing home energy costs by the household's gross income.

(2) Households with energy expenditures which exceed $1000 of energy expenditures per year are characterized by the Department as high energy consumers.

(c) The subrecipients shall follow the Department rules and established state and federal guidelines for determining eligibility for multifamily dwelling units as referenced in §5.527 of this subchapter (relating to Energy Audit Procedures).

(d) To determine income eligibility for program services, subrecipients must base annualized eligibility determinations on household income from 30 days prior to the date of application for assistance. Each subrecipient must document income from all sources for all household members for the entire 30 day period prior to the date of application and multiply by twelve (12) to annualize income. Income documentation must be collected from all income sources for all household members 18 years and older for the entire 30 day period.

(e) In the case of migrant, seasonal, part-time, temporary, or self-employed workers a longer period than 30 days may be used for annualizing income. However, the same method must be used for all similarly situated workers.

(f) If proof of income is unavailable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. In developing the policy and procedure, subrecipients shall give consideration to limiting the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory or seasonal in nature. The Department will review the written policy and its use during on-site monitoring visits.

(g) Subrecipient shall determine applicant income. The Department will provide definition of income lists to determine total household income. The lists contain income inclusions and exclusions and are located in §5.19 of this chapter (relating to Client Income Guidelines).

(h) Social Security numbers are not required for applicants.

§5.508. Liability Insurance.

(a) All subrecipient weatherization work shall be covered by general liability. Pollution Occurrence Insurance shall be a part of, or an addendum to, the general liability insurance policy. The Department includes funds in the DOE-WAP subrecipient budgets for the subrecipients to purchase liability insurance and pollution occurrence insurance as required for all units to be weatherized, including LIHEAP-WAP units.

(b) Subrecipients shall review and maintain their existing policies at least as frequently as contracts are awarded, to ensure that they and their subcontractors have adequate insurance coverage for all units to be weatherized.

§5.521. Client Education.

The subrecipients shall provide client education to each WAP client on energy conservation practices. Subrecipients shall provide education to identify energy waste, manage household energy use, and strategies to promote energy savings. Subrecipients are encouraged to use oral, written, and visual educational materials. These activities are paid with the Department's training and technical assistance funds and the subrecipients' program support funds.

§5.522. Mold Work Practices.

(a) The Department may provide mold work practices training methodology to all subrecipients.

(b) The Department may provide mold work practices to new subrecipient hires on an on-going basis.

(c) The subrecipients shall be responsible for providing the training to their weatherization subcontractors.

§5.523. Mold Conditions.

(a) If the subrecipient's energy auditor discovers a mold condition which the weatherization subcontractor cannot adequately address, then the unit shall be referred to the appropriate public agency for remedial action.

(b) The subrecipient shall provide the applicant written notification that their home cannot, at this time, be weatherized and why. They should also be informed of which agency they should contact to report the mold condition. The applicant should be advised that when the mold issue is resolved they may reapply for weatherization.

(c) If the energy auditor determines that the mold is treatable and covers less than the 25 contiguous square feet limit allowed to be addressed by the Department of State Health Services' guidelines, the subrecipient shall notify the applicant of the existence of the mold and potential health hazards, the proposed action to eliminate the mold, and that no guarantee is offered that the mold will be eliminated and that the mold may return. The auditor must obtain written approval from the applicant to proceed with the weatherization work.

§5.524. Lead Safe Work Practices.

Subrecipients must provide a one-day Lead Safe Weatherization (LSW) training, an LSW Manual, and an LSW Jobsite Handbook to their subcontractors. Subrecipients must obtain a signed Worker Verification of LSW Training form from the subcontractor indicating that the subcontractor received the LSW training, manual, and jobsite handbook. Subcontractors must follow Lead Safe Weatherization Work Practices as outlined by the U.S. Department of Energy.

§5.525. Eligibility for Multifamily Dwelling Units.

(a) The eligibility of dwelling units for WAP services can be found in 10 CFR §440.22.

(b) A multi family building is defined by DOE as a group of dwellings under the same roof.

(c) In order to weatherize large multifamily buildings containing twenty-five or more dwelling units or those with shared central heating (i.e. boilers) and/or shared cooling plants (i.e. cooling towers that use water as the coolant) regardless of the number of dwelling units, subrecipients shall submit in writing a request for approval from the Department. When necessary, the Department will seek approval from DOE. Approvals from DOE must be received prior to the installation of any weatherization measures in this type of structure.

(d) In order to weatherize shelters, subrecipients shall submit a written request for approval from the Department. Approvals from the Department must be received prior to the installation of any weatherization measures.

(e) If roof replacement is to be considered as part of repair cost under the weatherization process, the expenses must be shared equally by all eligible units weatherized under the same roof. If multiple storied buildings are weatherized, eligible ground floor units must be allocated a portion of the roof cost as well as the eligible top floor units. All weatherization measures installed in multifamily units must meet the standards set in 10 CFR §440.18(c)(9) and (15) and Appendix A--Standards for Weatherization Materials, and meet a savings-to-investment ratio of one or greater on the Energy Audit. DOE specifically addresses the eligibility of multifamily units in 10 CFR §440.22 (a)-(d).

(f) WAP subrecipients shall establish a multifamily master file for each multifamily project in addition to the individual unit requirements found in the record keeping requirement section of the contract. Subrecipients shall maintain a multifamily master file for each complex weatherized. The multifamily master file must include, at a minimum, the following forms: (Forms available on the Departments website).

(1) Multifamily Pre-Project Checklist Form;

(2) Multifamily Post-Project Checklist Form;

(3) Permission to Perform an Assessment for Multifamily Project Form;

(4) Landlord Agreement Form;

(5) Landlord Financial Participation Form; and

(6) Significant Data Required in all Multifamily Projects.

§5.526. Energy Audit.

The Department has developed an Energy Audit for the State of Texas Weatherization Assistance Programs. Weatherization subrecipients are required to complete the audit prior to commencing weatherization work.

§5.527. Energy Audit Procedures.

(a) Savings-to-Investment Ratio (SIR) for the energy audit procedures will determine the installation of allowable weatherization measures. The weatherization measures must result in energy cost savings over the lifetime of the measure(s), discounted to present value, that equal or exceed the cost of materials, and installation.

(b) The Energy Audit has not been approved for multi-family buildings containing 25 or more units. Since Texas subrecipients rarely propose to weatherize a building with 25 or more units, the Department will acquire a DOE approved energy audit for use in auditing multi-family buildings containing 25 or more units.

(c) Energy Auditors must use the established R-values for existing measures provided in the International Energy Conservation Code (IECC) when entering data into the Energy Audit. Subrecipients must follow minimum requirements set in the State of Texas adopted International Residential Code (IRC) or jurisdictions authorized by State law to adopt later editions.

(d) All materials and labor measures must be entered into the Audit.

§5.528. Health and Safety.

(a) Health and Safety funds will have a maximum of 10% of the materials, Labor and Program Support budgets.

(b) Subrecipients shall provide weatherization services with the primary goal of energy efficiency. The Department considers establishing a healthy and safe home environment to be important to ensuring that energy savings result from weatherization work.

(c) If health and safety issues identified on an individual unit (which would be exacerbated by any weatherization work performed) cannot be abated within the allowable WAP limits, the unit exceeds the scope of this program.

(d) Subrecipients must test for high carbon monoxide levels and bring carbon monoxide levels to acceptable levels before weatherization work can start. The Department has defined maximum acceptable CO readings as follows:

(1) 25 parts per million for cook stove burners and unvented space heaters;

(2) 100 parts per million for vented combustion appliance; and

(3) 150 parts per million for cook stove ovens.

§5.529. Whole House Assessment.

Subrecipients must conduct a whole house assessment on all eligible units. All allowable weatherization measures needed must be entered into the Energy Audit. Measures will be performed in order of highest SIR to lowest depending on funds available.

§5.530. Blower Door Standards.

Subrecipients are required use the blower door data form adopted by the Department and available on the Department's website (www.tdhca.state.tx.us).

§5.531. Training and Technical Assistance.

Upon the hiring of a new Weatherization Coordinator, the subrecipient is required to contact the Department with written notification within thirty (30) days of the hiring and request training and technical assistance.

§5.532. Training Funds for Conferences.

The Department provides financial assistance to subrecipients for training and technical activities for State sponsored and DOE sponsored workshops and conferences. Subrecipients may use WAP training funds to attend conferences provided the conference agenda includes topics directly related to administering WAP. Costs to attend the conference must be prorated by program for the appropriate portion. Only staff actually working on the WAP program may charge any of their travel costs to the program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER F. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY

10 TAC §§5.601 - 5.609

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter F, §§5.601 - 5.609, concerning Community Affairs Programs, Weatherization Assistance Program Department of Energy. The purpose of the new Chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§5.601. DOE Cost Principles and Administrative Requirements.

In addition to cost principles and administrative requirements listed in §5.2 of this chapter (relating to Cost Principles and Administrative Requirements), Subrecipients administering DOE programs must also adhere to 10 CFR Part 440 or DOE WAP rules, 10 CFR Part 600 and the International Residential Code.

§5.602. WAP Policy Advisory Council (WAP PAC).

(a) In accordance with Texas Government Code, §2110.005, the Department shall establish a State policy advisory council, in accordance with 10 CFR §440.17 and Texas Government Code, Chapter 2110, prior to the expenditure of any grant funds.

(b) The policy advisory council shall meet at least once a year to review the program plan and provide advice to the Department and meet as needed throughout the year to provide advice when it is requested.

(1) The WAP PAC may also meet as necessary in person, by telephone, or via electronic means to provide the Governing Board or Department guidance and advice with respect to the development and implementation of the weatherization assistance program and its activities; and

(2) The WAP PAC will cause minutes of any meetings or telephone conferences to be taken and forwarded to the Department or Governing Board.

(c) All meetings shall be held in accordance with Texas Government Code, Chapter 551.

§5.603. Adjusted Average Expenditure Per Dwelling Unit.

Expenditures of financial assistance provided under DOE-WAP funding for the weatherization services for labor, weatherization materials, and related matters shall not exceed the DOE adjusted average expenditure limit for the current program year per dwelling unit as provided by DOE, without special agreement via an approved waiver from the Department.

§5.604. Categorical Eligibility Criteria.

A dwelling unit shall be eligible for weatherization assistance if it is occupied by a family unit which contains a current household member who has received TANF or SSI at any time during the twelve month period preceding the determination of eligibility. The eligibility of dwelling units for WAP services can be found in 10 CFR §440.22.

§5.605. Training and Technical Assistance Carryover Funds.

(a) Training and technical assistance funds, allocation figure as provided by DOE, shall not be used to purchase vehicles or equipment for local agencies to perform weatherization services.

(b) Should unexpended training and technical assistance funds remain at the end of the program year, the Department may require these funds to be used to weatherize homes during the following year.

(c) If the Department determines these funds are needed for training and technical assistance, DOE can waive this provision if necessary. If this is the case, the Department will provide justification to DOE of the necessity to carryover these funds into the new program year and that they be included as a part of the new training and technical assistance budget.

§5.606. Electric Base Load Measures.

DOE has approved the inclusion of selected Electric Base Load (EBL) measures as part of the weatherization of eligible residential units. EBL measures must be determined cost effective with an SIR of one or greater by either audit analysis or separate DOE approved analytical tools. Refrigerators must be metered for a minimum of two (2) hours.

§5.607. Space Heater Requirements.

Subrecipients must follow DOE Weatherization Program Notice 08-4, Space Heater Policy.

§5.608. Vehicle Procurement Procedures.

All vehicles considered for purchase with U.S. Department of Energy (DOE) funds must be pre-approved by DOE via correspondence through the Department. Procurement procedures must include provisions for free and open competition. In the event a DOE approved vehicle is stolen or damaged in an accident beyond repair ("totaled"), the replacement vehicle must be approved by DOE via the Department. Any vehicle purchased without approval by DOE will result in disallowed costs.

§5.609. Grant Guidance on Leasing of Vehicles.

Subrecipients are not to enter into vehicle lease agreements for vehicles used in the WAP and paid for with WAP funds.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
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Texas Department of Housing and Community Affairs
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SUBCHAPTER G. WEATHERIZATION ASSISTANCE PROGRAM LOW INCOME HOME ENERGY ASSISTANCE PROGRAM

10 TAC §§5.701 - 5.705

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter G, §§5.701 - 5.705, concerning Community Affairs Programs, Weatherization Assistance Program Low Income Home Energy Assistance Program. The purpose of the new Chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§5.701. Allowable Expenditure per Dwelling Unit.

Expenditures of financial assistance provided under LIHEAP-WAP funding for the weatherization services for labor, weatherization materials, and related matters shall not exceed the allowable figure as set forth in the annual LIHEAP State Plan. The current allowable amount is set at $4,000 per dwelling unit.

§5.702. Electric Base Load Measures.

DOE has approved the inclusion of selected Electric Base Load (EBL) measures as part of the weatherization of eligible residential units. EBL measures will be allowable under the LIHEAP-WAP program. The EBL measures must be determined cost effective with an SIR of one or greater by either audit analysis or separate DOE approved analytical tools. Replacement of refrigerators 1993 or older or metered to have an SIR of one or greater in the Energy Audit or the Department's refrigerator assessment tool is an allowable energy efficiency measure. Refrigerators must be metered for a minimum of 30 minutes. All refrigerators to be replaced must be entered into the Energy Audit under "other measures."

§5.703. Outreach and Accessibility.

(a) The Department may continue to develop interagency collaborations with other low-income program offices and energy providers to perform outreach to targeted groups.

(b) Subrecipients shall conduct outreach activities.

(c) Subrecipients and their field offices shall accept applications at sites that are geographically accessible to all households requesting assistance.

(d) Other outreach activities may include:

(1) providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(2) distributing posters/flyers and other informational materials at local and county social service agencies, offices of aging, social security offices, etc.;

(3) providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(4) coordinating with other low-income services to provide LIHEAP information in conjunction with other programs;

(5) providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(6) providing LIHEAP applications, forms, and energy education materials in English and/or Spanish (or other appropriate language);

(7) working with energy vendors in identifying potential applicants;

(8) assisting applicants to gather needed documentation; and

(9) mailing information and applications.

§5.704. Energy Repairs.

WAP will provide weatherization, energy efficiency, and weatherization repair-related activities to eligible clients. LIHEAP-WAP energy-related repairs identified in this section must be entered into the Energy Audit as a repair measure. The list of allowable LIHEAP-WAP weatherization energy related repairs which may be undertaken when necessary to protect and complete regular energy efficiency weatherization measures include:

(1) roof, wall, and floor repair (excluding leveling);

(2) repair or replacement of essential electrical wiring;

(3) mobile home skirting to protect belly insulation;

(4) overhangs to protect mobile home doors; and

(5) carpentry work to protect outside water heater from the elements.

§5.705. Other Measures.

(a) LIHEAP-WAP energy efficiency measures identified in this section must be entered into the Audit as an "other measure."

(b) Solar screens and window film must be installed in the order West, East, South, and North.

(c) Replacement of refrigerators 1993 or older or that have an SIR of one or greater in Energy Audit or the Department's refrigerator assessment tool.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
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SUBCHAPTER H. SECTION 8 HOUSING CHOICE VOUCHER PROGRAM

10 TAC §5.801

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 5, Subchapter H, §5.801, concerning Community Affairs Programs, Section 8 Housing Choice Voucher Program. The purpose of the new Subchapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8. Contemporaneous with the proposal of this new rule, the Department is proposing the repeal of the existing Community Affairs Division rules in current Chapters 5, 6 and 8.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section as proposed.

Mr. Gerber has also determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be more clarity and certainty in the requirements of the individual community affairs programs. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on the rule and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new section.

§5.801. Project Access Initiative.

(a) Project Access is a program that utilizes Section 8 Housing Choice Vouchers administered by the Department to assist low-income non-elderly persons with disabilities in transitioning from institutions into the community by providing access to affordable housing.

(b) All Section 8 Program rules and regulations apply to the program.

(c) Project Access Eligibility Criteria. A Project Access voucher recipient must meet all Section 8 eligibility criteria as well as meet all of the following eligibility criteria:

(1) have a permanent disability as defined in §223 of the Social Security Code or be determined to have a physical, mental or emotional disability that is expected to be of long-continued and indefinite duration that impedes one's ability to live independently;

(2) be less than 62 years of age at the time of voucher issuance; and

(3) meet one of the following criteria:

(A) be an At-Risk Applicant and a previous resident of a nursing facility, intermediate care facility, or board and care facility as defined by HUD; or

(B) be a current resident of a nursing facility, intermediate care facility, or board and care facility at the time of voucher issuance as defined by HUD.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 6. ENERGY ASSISTANCE PROGRAMS

SUBCHAPTER A. DEPARTMENT OF ENERGY WEATHERIZATION ASSISTANCE PROGRAM (DOE-WAP)

10 TAC §§6.1 - 6.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 6, Subchapter A, §§6.1 - 6.21, concerning the Department of Energy Weatherization Assistance Program (DOE-WAP). These repeals are proposed in order to consolidate and simplify the existing rules for all Community Affairs Division Programs.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§6.1. Definitions.
§6.2. Program Overview.
§6.3. Distribution of Funds Formula.
§6.4. Subrecipient Eligibility.
§6.5. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.
§6.6. Eligibility for Multifamily Dwelling Units.
§6.7. Contract Expiration, Termination, and Nonrenewal.
§6.8. Subrecipient Requirements for Appeals Process for Applicants.
§6.9. WAP Policy Advisory Council (WAP PAC).
§6.10. Liability Insurance.
§6.11. Mold Work Practices.
§6.12. Mold Conditions.
§6.13. Client Education.
§6.14. Adjusted Average Expenditure Per Dwelling Unit.
§6.15. Energy Audit Procedures.
§6.16. Health and Safety.
§6.17. Training and Technical Assistance Carryover Funds.
§6.18. Electric Base Load Measures.
§6.19. Payments to Contractors and Vendors.
§6.20. State Contract Purchases.
§6.21. Subrecipient Reporting Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. LOW INCOME HOME ENERGY ASSISTANCE PROGRAM WEATHERIZATION ASSISTANCE PROGRAM (LIHEAP-WAP)

10 TAC §§6.101 - 6.121

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 6, Subchapter B, §§6.101 - 6.121, concerning the Low Income Home Energy Assistance Program Weatherization Assistance Program (LIHEAP-WAP). These repeals are proposed in order to consolidate and simplify the existing rules for all Community Affairs Division Programs.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§6.101. Definitions.

§6.102. Program Overview.

§6.103. Distribution of Funds Formula.

§6.104. Subrecipient Eligibility.

§6.105. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

§6.106. Eligibility for Multifamily Dwelling Units.

§6.107. Contract Expiration, Termination, and Nonrenewal.

§6.108. Subrecipient Requirements for Appeals Process for Applicants.

§6.109. Liability Insurance.

§6.110. Mold Work Practices.

§6.111. Mold Conditions.

§6.112. Client Education.

§6.113. Allowable Expenditure Per Dwelling Unit.

§6.114. Energy Audit Procedures.

§6.115. Energy Repairs.

§6.116. Health and Safety.

§6.117. Electric Base Load Measures.

§6.118. Payments to Contractors and Vendors.

§6.119. State Contract Purchases.

§6.120. Outreach and Accessibility.

§6.121. Subrecipient Reporting Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804819
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM (CEAP)

10 TAC §§6.201 - 6.214

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 6, Subchapter C, §§6.201 - 6.214, concerning the Comprehensive Energy Assistance Program (CEAP). These repeals are proposed in order to consolidate and simplify the existing rules for all Community Affairs Division Programs.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written

comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§6.201. Definitions.

§6.202. Program Overview.

§6.203. Distribution of Funds Formula.

§6.204. Subrecipient Eligibility.

§6.205. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

§6.206. Contract Expiration, Termination, and Nonrenewal.

§6.207. Subrecipient Requirements for Appeals Process for Applicants.

§6.208. Types of Assistance Available and Benefit Levels.

§6.209. Allowable Subrecipient Administrative, Assurance 16 Activities, and Direct Services Support Expenditures.

§6.210. Client Education.

§6.211. Payments to Contractors and Vendors.

§6.212. State Contract Purchases.

§6.213. Outreach, Accessibility, and Coordination.

§6.214. Subrecipient Reporting Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Department of Housing and Community Affairs
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CHAPTER 7. TEXAS FIRST-TIME HOMEBUYER PROGRAM

10 TAC §7.3

The Texas Department of Housing and Community Affairs proposes amendments to 10 TAC Chapter 7, §7.3 to include the completion of a pre-purchase homebuyer education course. The proposed amendment makes changes to the existing rule by adding the requirement of pre-purchase homebuyer education counseling for eligible First Time Homebuyers and for those First Time Homebuyers qualifying for Mortgage Credit Certificates.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on the rule and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The amended section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amendment.

§7.3. Administration of the Program.

(a) First-time homebuyer program eligibility requirements. To be eligible for any assistance under the program a first-time homebuyer must:

(1) - (2) (No change.)

(3) apply with respect to a home whose purchase price does not exceed the maximum purchase price limit for the relevant area, and is either a new or existing single family residence, new or existing condominium or town home, or manufactured housing that has been converted to real property in accordance with the Texas Occupations Code Chapter 1201; and [.]

(4) completion of a pre-purchase homebuyer education course as determined by Department staff.

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 8. PROJECT ACCESS PROGRAM RULES

10 TAC §8.1

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 8, §8.1, concerning Project Access Program Rules. The repeal of the rule makes way for the Department's reorganization, consolidation and simplification of all existing community services, energy assistance and Section 8 program rules.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§8.1. Project Access Program Rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 35. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§35.1 - 35.10

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC, Chapter 35, §§35.1 - 35.10, concerning the 2007 Multifamily Housing Revenue Bond Rules. The sections are proposed for repeal in order to promulgate new sections addressing the Department's 2009 Multifamily Housing Bond Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for multifamily housing revenue bonds, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§35.1. Introduction.

§35.2. Authority.

§35.3. Definitions.

§35.4. Policy Objectives & Eligible Developments.

§35.5. Bond Rating and Investment Letter.

§35.6. Application Procedures, Evaluation and Approval.

§35.7. Regulatory and Land Use Restrictions.

§35.8. Fees.

§35.9. Waiver of Rules.

§35.10. No Discrimination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Department of Housing and Community Affairs
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CHAPTER 35. 2009 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§35.1 - 35.10

The Texas Department of Housing and Community Affairs (the Department) proposes new §§35.1 - 35.10, concerning the 2009 Multifamily Housing Revenue Bond Rules. The sections are proposed new in order to promulgate new sections addressing the Department's 2009 Multifamily Housing Bond Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be to permit the adoption of new rules for multifamily housing revenue bonds, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§35.1. Introduction.

The purpose of this Chapter 35 is to state the Texas Department of Housing and Community Affairs (the "Department") requirements for issuing Bonds, the procedures for applying for multifamily housing revenue Bond financing, and the regulatory and land use restrictions imposed upon Developments financed with the issuance of Bonds for the 2009 Private Activity Bond Program Year. The rules and provisions contained in Chapter 35, of this title are separate from the rules relating to the Department's administration of the Housing Tax Credit Program. Applicants seeking a housing tax credit allocation should consult the Department's Qualified Allocation Plan and Rules ("QAP"), in effect for the program year for which the Housing Tax Credit application will be submitted. If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take precedence over the rules in the chapter. The Department encourages the participation in the Multifamily Bond programs by working directly with Applicants, lenders, trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner. The Department has simplified the process, within the limitation of statute, to affirmatively support and create affordable housing throughout the State of Texas.

§35.2. Authority.

The Department receives its authority to issue Bonds from Chapter 2306 of the Texas Government Code. All Bonds issued by the Department must conform to the requirements of the Act. Notwithstanding anything herein to the contrary, tax-exempt Bonds which are issued to finance the Development of multifamily rental housing are specifically subject to the requirements of the laws of the State of Texas, including but not limited to Chapter 2306 and Chapter 1372 of the Texas Government Code relating to Private Activity Bonds, and to the requirements of the Code (as defined in this chapter).

§35.3. Definitions.

The following words and terms, when used in the chapter, shall have the following meaning, unless context clearly indicates otherwise.

(1) Administrative Deficiency--As defined in §49.3(2) of this title.

(2) Applicant--As defined in §49.3(7) of this title.

(3) Application--As defined in §49.3(8) of this title.

(4) Board--The Governing Board of the Department.

(5) Bond--An evidence of indebtedness or other obligation, regardless of the sources of payment, issued by the Department under the Act, including a bond, note, or bond or revenue anticipation note, regardless of whether the obligation is general or special, negotiable, or nonnegotiable, in bearer or registered form, in certified or book entry form, in temporary or permanent form, or with or without interest coupons.

(6) Code--The U.S. Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(7) Development--As defined in §49.3(32) of this title.

(8) Development Owner--As defined in §49.3(35) of this title.

(9) Eligible Tenants--

(A) individuals and families of Extremely Low, Very Low and Low Income;

(B) Families of Moderate Income (in each case in the foregoing subparagraph (A) and (B) of this paragraph as such terms are defined by the Issuer under the Act); and

(C) Persons with Special Needs, in each case, with an Anticipated Annual Income not in excess of 140% of the area median income for a four-person household in the applicable standard metropolitan statistical area; provided that all Low-Income Tenants shall count as Eligible Tenants.

(10) Extremely Low Income--The income received by an individual or family whose income does not exceed thirty percent

(30%) of the area median income or applicable federal poverty line, as determined by the Act.

(11) Family of Moderate Income--A family:

(A) that is determined by the Board to require assistance taking into account:

(i) the amount of total income available for the housing needs of the individuals and family;

(ii) the size of the family;

(iii) the cost and condition of available housing facilities;

(iv) the ability of the individuals and family to compete successfully in the private housing market and to pay the amounts required by private enterprise for sanitary, decent, and safe housing; and

(v) standards established for various federal programs determining eligibility based on income; and

(B) that does not qualify as a family of Low Income.

(12) Ineligible Building Type--As defined in §49.3(56) of this title.

(13) Institutional Buyer--

(A) An accredited investor as defined in Regulation D promulgated under the Securities Act of 1933, as amended (17 CFR §230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)); or

(B) A qualified institutional buyer as defined by Rule 144A promulgated under the Securities Act of 1935, as amended (17 CFR §230.144(A)).

(14) Intergenerational Housing--As defined in §49.3(57) of this title.

(15) Low Income--The income received by an individual or family whose income does not exceed eighty percent (80%) of the area median income or applicable federal poverty line, as determined by the Act.

(16) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of law, including this title, the Act and §42 of the Code.

(17) New Construction--As defined in §49.3(64) of this title.

(18) Owner--An Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(19) Persons with Special Needs--Persons who:

(A) Are considered to be disabled under a state or federal law;

(B) Are elderly, meaning 60 years of age or older or of an age specified by an applicable federal program;

(C) Are designated by the Board as experiencing a unique need for decent, safe housing that is not being met adequately by private enterprise; or

(D) Are legally responsible for caring for an individual described by subparagraph (A), (B) or (C) of this paragraph and meet the income guidelines established by the Board.

(20) Private Activity Bonds--Any Bonds described by §141(a) of the Code.

(21) Private Activity Bond Program Scoring Criteria--The scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §35.6(e) of this title.

(22) Private Activity Bond Program Threshold Requirements--The threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §35.6(d) of this title.

(23) Program--The Department's Multifamily Housing Revenue Bond Program.

(24) Proper Site Control--Regarding the legal control of the land to be used for the Development, means the earnest money contract is in the name of the Applicant (principal or member of the General Partner); fully executed by all parties and escrowed by the title company.

(25) Property--The real estate and all improvements thereon, whether currently existing or proposed to be built thereon in connection with the Development, and including all items of personal property affixed or related thereto.

(26) Qualified 501(c)(3) Bonds--Any Bonds described by §145(a) of the Code.

(27) Rehabilitation--As defined in §49.3(81) of this title.

(28) Rural Area--An area that is located:

(A) Outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office of the United States Department of Agriculture (TRDO-USDA), other than an area that is located in a municipality with a population of more than 50,000.

(29) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(30) Tenant Income Certification--A certification as to income and other matters executed by the household members of each tenant in the Development, in such form as reasonably may be required by the Department in satisfaction of the criteria prescribed by the Secretary of Housing and Urban Development under §8(f)(3) of the Housing Act of 1937 ("the Housing Act") (42 U.S.C. §1437f) for purposes of determining whether a family is a lower income family within the meaning of the §8(f)(1) of the Housing Act.

(31) Tenant Services--Social services, including child care, transportation, and basic adult education, that are provided to individuals residing in low income housing under Title IV-A, Social Security Act (42 U.S.C. §§601 et seq.), and other similar services.

(32) Tenant Services Program Plan--The plan, subject to approval by the Department, which describes the Tenant Services to be provided by the Development Owner in a Development.

(33) Trustee--A national banking association organized and existing under the laws of the United States, as trustee (together with its successors and assigns and any successor trustee).

(34) TRDO-USDA--As defined in §49.3(94) of this title.

(35) Unit--As defined in §49.3(95) of this title.

(36) Very Low Income--The income received by an individual or family whose income does not exceed sixty percent (60%) of the area median income or applicable federal poverty line as determined under the Act.

§35.4. Policy Objectives and Eligible Developments.

The Department will issue Bonds to finance the rehabilitation, preservation or construction of decent, safe and affordable housing throughout the State of Texas. Eligible Developments may include those which are constructed, acquired, or rehabilitated and which provide housing for individuals and families of Low Income, Very Low Income, or Extremely Low Income, and Families of Moderate Income.

§35.5. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Developments shall have and be required to maintain a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc. or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, which approval shall be evidenced by adoption by the Board of a resolution authorizing the issuance of the credit-enhanced Bonds. Remedies relating to failure to maintain appropriate credit ratings shall be provided in the financing documents relating to the Development.

(b) Investment Letters. Bonds rated less than "A," or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investment letter acceptable to the Department. Subsequent purchasers of such Bonds shall also be qualified as Institutional Buyers and shall sign and deliver to the Department an investment letter in a form acceptable to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and shall carry a legend requiring any purchasers of the Bonds to sign and deliver to the Department an investment letter in a form acceptable to the Department.

§35.6. Application Procedures, Evaluation and Approval.

(a) Application Costs, Costs of Issuance, Responsibility and Disclaimer. The Applicant shall pay all costs associated with the preparation and submission of the Application--including costs associated with the publication and posting of required public notices--and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the Application process, the Applicant is solely responsible for determining whether to proceed with the Application, and the Department disclaims any and all responsibility and liability in this regard.

(b) Pre-application. An Applicant who requests financing from the Department for a Development shall submit a pre-application in a format prescribed by the Department. Within fourteen (14) days of the Department's receipt of the pre-application, the Department will be responsible for federal, state, and local community notifications of the proposed Development. Upon review of the pre-application, if the Development is determined to be ineligible for Bond financing by the Department, the Department will send a letter to the Applicant explaining the reason for the ineligibility. If the Development is determined to be eligible for Bond financing by the Department, the Department will score and rank the pre-application based on the Private Activity Bond Program Scoring Criteria as described in subsection (d) of this section. The Department will rank the pre-application with higher scores ranking higher within each priority defined by §1372.0321, Texas Government Code. All Priority 1 Applications will be ranked above all Priority 2 Applications which will be ranked above all Priority 3 Applications, regardless of score, reflecting a priority structure which gives consideration to the income levels of the tenants and the rent levels of the units consistent with §2306.359. This priority ranking will be used throughout the calendar year. In the event two or more Applications receive the same score, the Department will use, as a tie-breaking mechanism, a priority first for Applications involving rehabilitation; then if a tie still exists, the Application with the greatest number of points awarded for Quality and Amenities for the Development; then if a tie still exists, the Department will grant preference to the pre-application with the lower number of net rentable square feet per bond amount requested. Pre-Applications must meet the threshold requirements as stated in the Private Activity Bond Program Threshold Requirements as set out in subsection (c) of this section. After scoring and ranking, the Development and the proposed financing structure will be presented to the Department's Board for consideration of a resolution declaring the Department's initial intent to issue Bonds (the "inducement resolution") with respect to the Development. After Board approval of the inducement resolution, the induced Applications will be submitted to the Texas Bond Review Board for its lottery, waiting list or carryforward processing in rank order. The Texas Bond Review Board will draw the number of lottery numbers that equates to the number of eligible Applications submitted by the Department for participation in lottery. The lottery numbers drawn will not equate to a specific Development. The Texas Bond Review Board will thereafter assign the lowest lottery number drawn to the highest ranked Application as previously determined by the Department. The Texas Bond Review Board will issue reservations of allocation for Applications submitted for the waiting list or carryforward in the order provided by the Department based on rank. The criteria by which a Development may be deemed to be eligible or ineligible are explained in subsection (j) of this section, entitled Eligibility Criteria. The Private Activity Bond Program Scoring Criteria will be posted on the Department's website.

(c) Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff, for good cause, may recommend that the Board not approve an inducement resolution for an Application. The TDHCA Board reviews the Development as a whole for adherence to timelines and notification rules in the Qualified Allocation Plan and Rules, the need for the Development, compliance with local government rules and procedures, financial feasibility and the input of local and state officials and interested community members. These factors and others will be used to make the final determination at the appropriate time. Because each Development is unique, making the final determination is often dependent on the issues presented at the time the Application is presented to the Board.

(d) Pre-Application Threshold Requirements.

(1) As the Department reviews the Application, the Department will use the following assumptions, even if not reflected by the Applicant in the Application. Prequalification Assumptions:

(A) Development Feasibility:

(i) Debt Coverage Ratio must be greater than or equal to 1.15;

(ii) Deferred Developer Fees are limited to 80% of Developer's Fees;

(iii) Contractor Fee, Overhead and General Requirements are limited to 14% of direct costs plus site work cost; and

(iv) Developer Fees cannot exceed 15% of the project's Total Eligible Basis.

(B) Construction Costs Per Unit Assumption. Costs not to exceed $85 per square foot for general population developments and $95 for elderly developments (Acquisition/Rehab developments are exempt from this requirement);

(C) Anticipated Interest Rate and Term. As stated in the Summary of Financing Participants in the pre-application;

(D) Size of Units (Acquisition/Rehab developments are exempt from this requirement):

(i) Efficiency Units must be at least 550 square feet;

(ii) One bedroom Unit must be greater than or equal to 650 square feet for family and 600 square feet for senior Units;

(iii) Two bedroom Unit must be greater that or equal to 900 square feet for family and 700 square feet for senior Units;

(iv) Three bedroom Unit must be greater than or equal to 1,000 square feet; and

(v) Four bedroom Unit must be greater than or equal to 1,200 square feet.

(2) Appropriate Zoning. Evidence of appropriate zoning for the proposed use or evidence of application made and pending decision;

(3) Executed Site Control. Properly executed and escrow receipted site control through the inducement Board meeting at pre-application and 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting at full application. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting;

(4) Current Market Information (must support affordable rents);

(5) Completed current TDHCA Bond Pre-Application;

(6) Completed Multifamily Rental Worksheets;

(7) Certification of Local Elected Official request for neighborhood organization information and Public Notification Information;

(8) Completed 2009 Bond Review Board Residential Rental Attachment;

(9) Signed letter of Responsibility for All Costs Incurred;

(10) Signed Mortgage Revenue Bond Program Certification Letter;

(11) Evidence of Paid Application Fees ($1,000 to TDHCA, $1,500 to Vinson and Elkins, as the Department's bond counsel, and $5,000 to Bond Review Board);

(12) Boundary Survey or Plat clearly identifying the location and boundaries of the subject property;

(13) Local Area map showing the location of the Property and Community Services/Amenities within a three (3) mile radius;

(14) Utility Allowance documented from the Appropriate Local Housing Authority;

(15) Organization Chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant with evidence of Entity Registration or Reservation with the Secretary of State; and

(16) Required Notification. Evidence of notification is required in the form of the "Certification of Notifications" form provided in the pre-application stating that they made all the required notifications prior to the deadlines and a copy of the entire mailing list on the "Public Information Form" (including names and complete addresses) of all the recipients. Proof of delivery of the notification must not be older than three months prior to the date of Application submission date. Notification must be sent to all the following individuals and entities (If the QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted reflect a notification process that is different from the process listed in subparagraphs (A) - (F) of this paragraph, then the QAP and Rules will override the notification process listed in subparagraphs (A) - (F) of this paragraph):

(A) State Senator and Representative that represents the community containing the development;

(B) Presiding Officer of the governing body of any municipality containing the development and all elected members of that body (Mayor, City Council members);

(C) Presiding Officer of the governing body of the county containing the development and all elected members of that body (County Judge and/or Commissioners);

(D) School District Superintendent of the school district containing the development;

(E) Presiding Officer of the School Board of Trustees of the school district containing the development; and

(F) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under clause (i) of this subparagraph must be made by the deadlines described in that clause. Evidence of notification must meet the requirements identified in clause (ii) of this subparagraph to all of the individuals and entities identified in clause (iii) of this subparagraph.

(i) The Applicant must request Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(I) No later than fourteen (14) days prior to the date the Application is submitted, the Applicant must e-mail, fax or mail with registered receipt a completed, "Neighborhood Organization Request" letter as provided in the Pre-Application materials to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request neighborhood organizations from that source in the same format;

(II) If no reply letter is received from the local elected officials by seven (7) days prior to the Application submission, then the Applicant must certify to that fact with the "Pre-Application Notification Certification Form" provided in the Pre-Application materials; and

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries contain the proposed Development Site or that the Applicant has knowledge of as of the Pre-Application Submission in the "Certification of Notification Form" provided in the Pre-Application.

(ii) No later than the date the Pre-Application is submitted, Notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt in the format required in the "Pre-Application Notification Template" provided in the Pre-Application materials. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials; however the county officials are required to be notified. Evidence of Notification is required in the form of a certification in the "Certification of Notification Form" provided in the Pre-Application materials. It is strongly encouraged that Applicants retain proof of delivery of the notifications to the persons or entities prescribed in subclauses (I) - (IX) of this clause in the event the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries contain the proposed Development Site as identified in clause (i)(III) of this subparagraph;

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of any municipality containing the Development;

(V) All elected members of the governing body of any municipality containing the Development;

(VI) Presiding officer of the governing body of the county containing the Development;

(VII) All elected members of the governing body of the county containing the Development;

(VIII) State representative of the district containing the Development; and

(IX) State senator of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Private Activity Bonds and Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.) and population being served (family, Intergenerational Housing, or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate; and

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur.

(17) All New Construction or Reconstruction units must provide the amenities in subparagraphs (A) - (G) of this paragraph. Rehabilitation (excluding Reconstruction) must provide the amenities in subparagraphs (B) - (G) of this paragraph unless expressly identified as not required (§2306.187).

(A) All new construction units must be wired with RG-6 COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(B) Blinds or window coverings for all windows;

(C) Energy-Star or equivalently rated dishwasher and disposal (not required for TRDO-USDA Developments);

(D) Energy-Star or equivalently rated Refrigerator;

(E) Exhaust/vent fans (vented to the outside) in bathrooms;

(F) Energy-Star or equivalently rated ceiling fans in living areas and bedrooms; and

(G) Energy-Star or equivalently rated lighting fixtures in all Units.

(e) Pre-Application Scoring Criteria.

(1) Income and rent levels of the tenants: Priority 1 applications will receive 10 points, Priority 2 applications will receive 7 points and Priority 3 applications will receive 5 points.

(2) Construction Cost Per Unit includes: direct hard costs, site work, contractor profit, overhead, general requirements and contingency. Calculation will be hard costs per square foot of net rentable area. Must be greater than or equal to $85 per square foot for general population Developments and $95 per square foot for elderly Developments (1 point) (Acquisition/Rehab will automatically receive (1 point)).

(3) Size of Units. Average size of all Units combined in the development must be greater than or equal to 950 square foot for family and must be greater than or equal to 750 square foot for elderly (5 points). (Acquisition/Rehab developments will automatically receive 5 points).

(4) Period of Guaranteed Affordability for Low Income Tenants. Add 10 years of affordability after the extended use period for a total affordability period of 40 years (1 point).

(5) Quality and Amenities Substitutions in amenities will be allowed as long as the overall score is not affected. Applications in which Developments provide specific qualities and amenities at no extra charge to the tenant will be awarded points as follows: Acquisition/Rehab developments will receive 1.5 points for each item.

(A) Laundry Connections (2 points);

(B) Self-cleaning or continuous cleaning ovens (1 point);

(C) Microwave Ovens (in each Unit) (1 point);

(D) Refrigerator with icemaker (1 point);

(E) Laundry equipment (washer and dryers) for each individual Unit including a front load washer and dryer in required UFAS compliant Units (3 points);

(F) Storage Room of approximately nine (9) square feet or greater (does not include bedroom, entryway or linen closets (does not have to be in the unit but must be on the property site) (1 point);

(G) Covered entries (1 point);

(H) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(I) Covered patios or covered balconies (1 point);

(J) Covered Parking (including garages) of at least one covered space per Unit (2 points);

(K) High speed internet service to all Units at no cost to residents (2 points);

(L) Fire sprinklers in all Units (2 points);

(M) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry; excludes EIFS synthetic stucco (3 points) Applicants may not select this item if subparagraph (N) of this paragraph is selected);

(N) Greater than 75% Masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry; excludes EIFS synthetic stucco (1 point) Applicants may not select this item if subparagraph (X) of this paragraph is selected);

(O) Thirty year architectural shingle roofing (1 point);

(P) Use of energy efficient alternative construction materials (structurally insulated panels) with wall insulation at a minimum of R-20 (3 points);

(Q) R-15 Walls/R-30 Ceilings (rating of wall system) (3 points);

(R) 14 SEER HVAC or evaporative coolers in dry climates for new construction, adaptive reuse and reconstruction or radiant barrier in the attic for the rehabilitation (3 points);

(S) Energy Star or equivalently rated kitchen appliances (2 points);

(T) One Children's Playscape Equipped for 5 to 12 years olds, or one Tot Lot (1 point);

(U) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(V) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(W) Enclosed sun porch or covered community porch/patio (2 points);

(X) BBQ Grills and Tables (at least one each per 50 Units) (1 point);

(Y) Accessible walking path/jogging path separate from a sidewalk (1 point);

(Z) Full Perimeter Fencing (2 points);

(AA) Controlled access gate (1 point);

(BB) Equipped and functioning business center or equipped computer learning center with 1 computer for every 30 Units proposed in the Application, and 1 printer for every 3 computers (with a minimum of one printer), and 1 fax machine (2 points);

(CC) Furnished and staffed children's activity center (3 points);

(DD) Horseshoe pit, putting green or shuffleboard court) (1 point);

(EE) Furnished Fitness Center equipped with a minimum of two of the following fitness equipment options with at least one per every 40 Units or partial increment of 40 Units: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, stationary weight bench, sauna, stair climber, etc. The maximum number of equipment options required for any Development, regardless of number of Units, shall be five (2 points);

(FF) Library with an accessible sitting area (separate from the community room) (1 point);

(GG) Gazebo with sitting area (1 point);

(HH) Covered Pavilion that includes barbeque grills and tables (2 points);

(II) Swimming pool (3 points);

(JJ) Community laundry room (with at least one front leading washer (1 point);

(KK) Furnished Community room (1 point);

(LL) Service coordinator office in addition to leasing offices (1 point);

(MM) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(NN) Health Screening Room (1 point);

(OO) Secured Entry (elevator buildings only) (1 point);

(PP) Community Dining Room with full or warming kitchen (3 points);

(QQ) Community Theatre Room equipped with a 52 inch or larger screen with surround sound equipment, DVD player; and theatre seating (3 points);

(RR) Green Building amenities:

(i) Evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(ii) Passive solar heating/cooling (3 points);

(iii) Water conserving features (toilets using less than or equal to 1.6 gallons per flush, shoerheads, kitchen faucets or bathroom faucets using less than or equal to 2.0 gallons per minute) (1 point for each);

(iv) Solar water heaters (2 points);

(v) Collected water (at least 50%) for irrigation purposes (2 points);

(vi) Sub-metered utility meters (3 points);

(vii) Energy Star qualified windows and glass doors (2 points);

(viii) Thermally and draft efficient doors (SHGC of 0.40 and U-value specified by climate zone according to the 2006 IECC) (2 points);

(ix) Photovoltaic panels for electricity and design and wiring for the use of such panels (3 points);

(x) Construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(xi) Exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria (2 points);

(xii) HVAC, windows, domestic hot water heater or insulation that exceeds Energy Star standards or exceeds the IRC 2006 (2 points);

(xiii) Bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (2 points);

(xiv) Recycle service provided throughout the compliance period (1 point); or

(xv) Water permeable walkways (1 point).

(6) Tenant Services (Tenant Services shall include only direct costs (tenant services contract amount, supplies for services, internet connections, initial cost of computer equipment, etc.). Indirect costs such as overhead and utility allocations may not be included):

(A) $10.00 per Unit per month (10 points);

(B) $7.00 per Unit per month (5 points); or

(C) $4.00 per Unit per month (3 points).

(7) Zoning appropriate for the proposed use or no zoning required for the intended use must be in place at the time of the Application submission date, which is listed on the Department's website for Applications submitted for waiting list and carryforward, in order to receive points (5 points).

(8) Proper Site Control (as defined in §35.3(24) of this title). Site control must be through the scheduled Board meeting inducement and at full application must be 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting. For Applications submitted for waiting list and carryforward all information must be correct at the time of the Application submission date, listed on the Department's website in order to receive points (5 points).

(9) Development Support/Opposition. Maximum net points of +24 to -24. Each letter will receive a maximum of +3 to -3. All letters received by 5:00 PM, seven (7) business days prior to the date of the Board meeting at which the Application will be considered for Applications submitted for waiting list and carryforward will be used in scoring. The letter must specifically indicate support or opposition otherwise the letter will be considered neutral:

(A) Texas State Senator and Texas State Representative (maximum +3 to -3 points per official);

(B) Presiding officer of the governing body of any municipality containing the Development and the elected district member of the governing body of the municipality containing the Development (maximum +3 to -3 points per official);

(C) Presiding officer of the governing body of the county containing the Development and the elected district member of the governing body of the county containing the Development (if the site is not in a municipality, these points will be doubled) (maximum +3 to -3 points per official); and/or

(D) Local School District Superintendent and Presiding Officer of the Board of Trustees for the School district containing the Development (maximum +3 to -3 points per official).

(10) Proximity to Community Services/Amenities Community services/amenities within three (3) miles of the site. A map must be included with the Application showing a three (3) mile radius notating where the services/amenities are located. (Acquisition/Rehab developments will receive 1.5 points for each item in subparagraphs (A) - (O) of this paragraph):

(A) Full service grocery store or supermarket (1 point);

(B) Pharmacy (1 point);

(C) Convenience store/mini-market (1 point);

(D) Retail Facilities (Target, Wal-Mart, Home Depot, Bookstores, etc.) (1 point);

(E) Bank/Financial Institution (1 point);

(F) Restaurant (1 point);

(G) Indoor public recreation facilities (community center, civic center, YMCA, museum) (1 point);

(H) Outdoor public recreation facilities (park, golf course, public swimming pool) (1 point);

(I) Fire/Police Station (1 point);

(J) Medical Facilities (hospitals, minor emergency, medical offices) (1 point);

(K) Public Library (1 point);

(L) Public Transportation (1/2 mile from site) (1 point);

(M) Public School (only one school required for point and only eligible with general population developments) (1 point);

(N) Dry Cleaners; and/or

(O) Family Video Rental (i.e. Blockbuster, Hollywood Video, Movie Gallery) (1 point).

(11) Proximity to Negative Features adjacent to or within 300 feet of any part of the Development site boundaries. A map must be included with the application showing where the feature is located. Developer must provide a letter stating there are none of the negative features listed in subparagraphs (A) - (F) of this paragraph within the stated area if that is correct. (maximum -6 points):

(A) Junkyards (1 point deducted);

(B) Active Railways (excluding light rail) (1 point deducted);

(C) Heavy industrial/manufacturing plants (1 point deducted);

(D) Solid Waste/Sanitary Landfills (1 point deducted);

(E) High Voltage Transmission Towers within 100 feet (1 point deducted); and/or

(F) Accident zones or flight paths for commercial or military airports (1 point deducted).

(12) Acquisition/Rehabilitation Developments will receive thirty (30) points. This will include the demolition of old buildings and new construction of the same number of units if allowed by local codes or less units to comply with local codes (not to exceed 252 total units).

(13) Preservation Developments will receive ten (10) points. This includes rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two years or for which the there has been a rent restriction requirement in the past ten years. Evidence must be provided.

(14) Declared Disaster Areas. Applications will receive 7 points, if at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in an area declared to be a disaster under §418.014 of the Texas Government Code. This includes Federal, State and Governor declared disaster areas.

(15) Developments in Census Tracts with No Other Existing Developments Supported by Tax Credits. Applications will receive 6 points if the proposed Development is located in a census tract in which there are no other existing developments that were awarded housing tax credits in the last 5 years and 3 points if there are no other existing developments that were awarded housing tax credits in the last 3 years. The applicant must provide evidence of the census tract in which the Development is located. These census tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(16) Notary Public Services for Tenants. Applications will receive 1 point for this item (§2306.6710(b)(3)) To receive this point, the Applicant must submit a certification that the Development will provide notary public services to the tenants at no cost to the tenant. This provision will be included in the Land Use Restriction Agreement and Regulatory Agreement.

(f) Multiple Site Applications. For the purposes of scoring, applicants must submit the required information as outlined in the Pre-Application Submission Manual. Each individual property will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(g) Financing Commitments. After approval by the Board of the inducement resolution, and as part of the submission of a final application, the Applicant will be solely responsible for making appropriate arrangements with financial institutions which are to be involved with the issuance of the Bonds or the financing of the Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(h) Final Application. An Applicant who elects to proceed with submitting a final Application to the Department must submit the Volumes I and II of the Application, for Priority 1 and 2, prior to receipt of a reservation of allocation from the Texas Bond Review Board. For Priority 3 Applications the Volumes I and II must be submitted within fourteen (14) days of the reservation date from the Texas Bond Review Board. The Volume III of the Application and such supporting material as is required by the Department must be submitted at least sixty (60) days prior to the scheduled meeting of the Board at which the Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. If the Applicant is applying for other Department funding then refer to the Rules for that program for Application submission requirements. The final application must adhere to the Department's QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted. The Department may determine that supporting materials listed in the full application shall be provided subsequent to the final Application deadline in accordance with a schedule approved by the Department. Failure to provide any supporting materials in accordance with the approved schedule may be grounds for terminating the Application and returning the reservation to the Texas Bond Review Board.

(1) A Public Notification Sign shall be installed on the proposed Development site, regardless of Priority, within thirty (30) days of the Department's receipt of Volumes I and II. The applicant must certify to the fact that the sign was installed within (thirty) 30 days of Volume I and II submission and the date, time and location of the TEFRA Public Hearing must be included on the sign at least (thirty) 30 days prior to the hearing date. The sign must be at least four (4) feet by eight (8) feet in size and be located within twenty (20) feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day the TDHCA Board takes final action on the Application for the development. The information and lettering on the sign must meet the minimum requirements identified in the Application. In areas where the Public Notification Sign is prohibited by local ordinance or code, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall mail written notification to all addresses located within the footage distance required by the local municipality zoning ordinance or 1,000 feet, if there is no local zoning ordinance or if the zoning ordinance does not require notification, of any part of the proposed Development site. This written notification must include the information otherwise required for the sign. If the Applicant chooses to provide this mailed notice in lieu of signage, the final Application must include a map of the proposed Development site and mark the 1,000 foot or local ordinance area showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. The Applicant must mail notice to any public official that changed from the submission of the pre-application to the submission of the final application and any neighborhood organization that is known and was not notified at the time of the pre-application submission. No additional notification is required unless the Applicant submitted a change in the Application that reflects a total Unit increase greater than 10%, an increase greater than 10% for any given AMFI, a decrease in the number of market rate units, or a change in the population being served (elderly, general population or transitional); and

(2) Completed Uniform Application and Multifamily Rental Worksheets in the format required by the Department as posted to the Department's website.

(i) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the email within 24 hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Ad-

ministrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five business days. Failure to resolve all outstanding deficiencies within five business days will result in a penalty fee of $500 for each day the deficiency remains unresolved. Any Application with unresolved deficiencies after the 10th day from the issuance of the deficiency notice will be terminated. The Applicant will be responsible for the payment of any fees accrued pursuant to this section regardless of any termination pursuant to this section. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid.

(j) Eligibility Criteria. The Department will evaluate the Development for eligibility at the time of pre-application, and at the time of final Application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the conditions set out in paragraphs (1) - (6) of this subsection in order for a Development to be considered eligible:

(1) The proposed Development must further meet the public purposes of the Department as identified in the Code.

(2) The proposed Development and the Applicant and its principals must satisfy the Department's Underwriting Rules and Guidelines (§1.32 of this title). The pre-application must include sufficient information for the Department to establish that the Underwriting Guidelines can be satisfied. The final Application will be thoroughly underwritten according to the Underwriting Rules and Guidelines (§1.32 of this title).

(3) The Development must not be located on a site determined to be unacceptable for the intended use by the Department.

(4) Any Development in which the Applicant or principals of the Applicant have an ownership interest must be found not to be in Material Non-Compliance under the compliance Rules in effect at the time of pre-application submission. Any corrective action documentation affecting the Material Non-compliance status score must be submitted to the Department no later than thirty (30) days prior to final application submission.

(5) Neither the Applicant nor any principals of the Applicant is, at the time of Application:

(A) barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or

(B) has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentation, misappropriation of funds, or other similar criminal offenses within fifteen (15) years; or

(C) is subject to enforcement action under state or federal securities law, action by the NASD, subject to a federal tax lien, or the subject of an enforcement proceeding with any governmental entity; or

(D) neither applicant nor any principals of the applicant have a development under their ownership or control with a Material Non-compliance score as set out in the Department's Compliance Monitoring Policies and Procedures (§60 of this title); or

(E) otherwise disqualified or debarred from participation in any of the Department's programs.

(6) Neither the Applicant nor any of its principals may have provided any fraudulent information, knowingly false documentation or other intentional or negligent misrepresentation in the Application or other information submitted to the Department.

(7) An application may include either the rehabilitation or new construction, or both the rehabilitation and new construction, of qualified residential rental facilities located at multiple sites and with respect to which 51% or more of the residential units are located:

(A) in a county with a population of less than 75,000; or

(B) in a county in which the median income is less than the median income for the state, provided that the units are located in that portion of the county that is not included in a metropolitan statistical area containing one or more projects that are proposed to be financed, in whole or in part, by an issuance of bonds. The number of sites may be reduced as needed without affecting their status as a project for purposes of the application, provided that the final application for a reservation contains at least two sites (§1372.002).

(k) Bond Documents. After receipt of the final Application, bond counsel for the Department shall draft Bond documents which conform to the state and federal laws and regulations which apply to the transaction.

(l) Public Hearings; Board Decisions. For every Bond issuance, the Department will hold a public hearing in accordance with §2306.0661, Texas Government Code and §147(f) of the Code, in order to receive comments from the public pertaining to the Development and the issuance of the Bonds. The Applicant or member of the Development team must be present and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should contain at a minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is an acquisition/rehabilitation then the presentation should include the scope of work that will be done to the property. All handouts must be submitted to the Department for review at least two (2) days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant. The Board's decisions on approvals of proposed Developments will consider all relevant matters. Any topics or matters, alone or in combination, may or may not determine the Board's decision. The Department's Board will consider the following topics in relation to the approval of a proposed Development:

(1) The developer market study;

(2) The location;

(3) The compliance history of the developer;

(4) The financial feasibility;

(5) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(6) The Development's proximity to other low income Developments;

(7) The availability of adequate public facilities and services;

(8) The anticipated impact on local school districts;

(9) Zoning and other land use considerations;

(10) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(11) Other good cause as determined by the Board.

(m) Approval of the Bonds.

(1) Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by the Department's staff, will consider the approval of the Bond issuance, final Bond documents and, in the instance of privately placed Bonds, the pricing of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 and §1.8 of this title. The Department's conduit housing transactions will be processed in accordance with the Texas Bond Review Board rules 34 TAC, Part 9, Chapter 181, Subchapter A and Chapter 1372, Texas Government Code. The Bond issuance must receive an approving opinion from the Department's bond counsel with respect to the legality and validity of the Bonds and the security therefore, and in the case of tax-exempt Bonds, with respect to the excludability from gross income for federal income tax purposes of interest on the Bonds.

(2) Alternative Dispute Resolution Policy. The Department encourages use of Alternative Dispute Resolution methods as outlined in §1.17 of this title.

(n) Local Permits. Prior to the closing of the Bonds, all necessary approvals, including building permits, from local municipalities, counties, or other jurisdictions with authority over the Development must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be provided to the Department.

(o) Closing. If there are changes to the Application prior to closing that have an adverse affect on the score and ranking order that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). Once all approvals have been obtained and Bond documents have been finalized to the respective parties' satisfaction, the Bond transaction will close. Any outstanding Housing Trust Fund Pre-Development loans for the proposed Development site must be paid in full at the time the bond transaction is closed. All Applicants are subject to §1.20(g) of this title. Upon satisfaction of all conditions precedent to closing, the Department will issue Bonds in exchange for payment thereof. The Department will then loan the proceeds of the Bonds to the Applicant and disbursements of the proceeds may begin.

§35.7. Regulatory and Land Use Restrictions.

(a) Filing and Term of LURA. A Regulatory and Land Use Restriction Agreement or other similar instrument (the "LURA"), will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Department. For Developments involving new construction, the term of the LURA will be the longer of 30 years, the period of guaranteed affordability or the period for which Bonds are outstanding. For the financing of an existing Development, the term of the LURA will be the longer of the longest period which is economically feasible in accordance with the Act, or the period for which Bonds are outstanding.

(b) Development Occupancy. The LURA will specify occupancy restrictions for each Development based on the income of its tenants, and will restrict the rents that may be charged for Units occupied by tenants who satisfy the specified income requirements. Pursuant to §2306.269, Texas Government Code, the LURA will prohibit a Development Owner from excluding an individual or family from admission to the Development because the individual or family participates in the housing choice voucher program under Section 8, United States Housing Act of 1937 (the "Housing Act"), and from using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than two and one half (2.5) times the individual's or family's share of the total monthly rent payable to the Development Owner of the Development. Development occupancy requirements must be met on or prior to the date on which Bonds are issued unless the Development is under construction. Adequate substantiation that the occupancy requirements have been met, in the sole discretion of the Department, must be provided prior to closing. Occupancy requirements exclude Units for managers and maintenance personnel that are reasonably required by the Development.

(c) Set Asides.

(1) Developments which are financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds must be restricted under one of the following two minimum set-asides:

(A) at least twenty percent (20%) of the Units within the Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed fifty percent (50%) of the area median income; or

(B) at least forty percent (40%) of the Units within the Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed sixty percent (60%) of the area median income.

(2) The Development Owner must designate at the time of Application which of the two set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with §1372.0321, Texas Government Code. Units intended to satisfy set-aside requirements must be distributed evenly throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit; provided, however, that, should a tenant's income, as of the most recent determination thereof, exceed 140% of the then applicable income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant (Required federal set-aside requirements).

(d) Global Income Requirement. All of the Units that are available for occupancy in Developments financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds shall be occupied or held vacant (in the case of new construction) and available for occupancy at all times by persons or families whose income does not exceed one hundred and forty percent (140%) of the area median income for a four-person household.

(e) Qualified 501(c)(3) Bonds. Developments which are financed from the proceeds of Qualified 501(c)(3) Bonds are further subject to the restriction that at least seventy-five percent (75%) of the Units within the Development that are available for occupancy shall be occupied (or, in the case of new construction, held vacant and avail-

able for occupancy until such time as initial lease-up is complete) at all times by individuals and families of Low Income (less than or equal to 80% of AMFI).

(f) Taxable Bonds. The occupancy requirements for Developments financed from the issuance of taxable Bonds will be negotiated, considered and approved by the Department on a case by case basis.

(g) Fair Housing. All Developments financed by the Department must comply with the Fair Housing Act which prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability. The Fair Housing Act also mandates specific design and construction requirements for multifamily housing built for first occupancy after March 13, 1991, in order to provide accessible housing for individuals with disabilities.

(h) Tenant Services. The LURA will require that the Development Owner offer a variety of services for residents of the Development through a Tenant Services Program Plan which is subject to annual approval by the Department.

(i) Land Use Restriction Agreement. Requirements as defined in Chapter 60, Subchapter A of this title.

§35.8. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, the following fees: $1,000 (payable to TDHCA), $2,000 (payable to Vinson & Elkins, the Department's Bond Counsel) and $5,000 (payable to the Texas Bond Review Board (BRB)) These fees cover the costs of pre-application review and filing fees to the BRB. The Department shall set fees to be paid by the Applicant in order to cover the costs of pre-application review, Application and Development review, the Department's expenses in connection with providing financing for a Development, and as required by law. (§1372.006(a), Texas Government Code).

(b) Application and Issuance Fees. At the time of full application the Applicant is required to submit a tax credit application fee of $30/unit and $10,000 for the bond application fee (for multiple site Applications $10,000 or $30/unit, whichever is greater, for the bond application fee.) At the closing of the bonds the following fees are required: an issuance fee equal to 50 basis points (0.005) of the issued bond amount, administration fee equal to 20 basis points (0.002) and a Private Activity Bond compliance fee equal to $15/unit and a tax credit compliance fee equal to $40/unit. For refunding Applications the Application fee will be $10,000 unless the refunding is not required to have a TEFRA public hearing, in which case the fee will be $5,000.

(c) Annual Administration, Portfolio Management and Compliance, and Asset Management Fees. The Department shall set ongoing fees to be paid by Development Owners to cover the Department's costs of administering the Bonds, portfolio management and compliance with the program requirements applicable to each Development and asset management applicable requirements. The annual tax credit compliance fee is paid in advance (for the duration of the compliance or affordability period) and is equal to $40/unit beginning two years from the first payment date; the Private Activity Bond compliance fee is paid in advance (for as long as the bonds are outstanding) and is equal to $15/unit beginning two years from the first payment date; the asset management fee is paid in advance and is equal to $25/unit beginning two years from the first payment date. Compliance fees may be adjusted from time to time by the Department. The annual administration fee is paid in arrears and is equal to 10 basis points (0.001) of the outstanding bond amount beginning three years from the closing date. These fees are paid for a minimum of thirty (30) years or as long as the bonds are outstanding.

§35.9. Waiver of Rules.

Provided all requirements of the Act, the Code, and any other applicable law are met, the Board may waive any one or more of the Rules set forth in §§35.3 - 35.8 of this title relating to the Multifamily Housing Revenue Bond Program in order to further the purposes and the policies of Chapter 2306, Texas Government Code; to encourage the acquisition, construction, reconstruction, or rehabilitation of a Development that would provide decent, safe, and sanitary housing, including, but not limited to, providing such housing in economically depressed or blighted areas, or providing housing designed and equipped for Persons with Special Needs; or for other good cause, as determined by the Board.

§35.10. No Discrimination.

The Department and its staff or agents, Applicants, Development Owners, and any participants in the Program shall not discriminate under this Program against any person or family on the basis of race, creed, national origin, age, religion, handicap, family status, or sex, or against persons or families on the basis of their having minor children, except that nothing herein shall be deemed to preclude a Development Owner from selecting tenants with Special Needs, or to preclude a Development Owner from selecting tenants based on income in renting Units to comply with the set asides under the provisions of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804824
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 49. 2007 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.23

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 49, §§49.1 - 49.23, concerning the 2007 Housing Tax Credit Program Qualified Allocation Plan and Rules. The sections are proposed for repeal in order to promulgate new sections conforming to the requirements of laws enacted under the Internal Revenue Code of 1986, §42, as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§49.1. Purpose and Authority; Program Statement; Allocation Goals.

§49.2. Coordination with Rural Agencies.

§49.3. Definitions.

§49.4. State Housing Credit Ceiling.

§49.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

§49.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations on Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

§49.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

§49.8. Pre-Applications for Competitive Housing Tax Credits: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results (§2306.6704).

§49.9. Application: Submission; Communication with Department Employees; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2008 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

§49.10. Board Decisions; Waiting List; Forward Commitments.

§49.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

§49.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

§49.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

§49.14. Carryover; 10% Test; Commencement of Substantial Construction.

§49.15. LURA, Cost Certification.

§49.16. Housing Credit Allocations.

§49.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

§49.18. Compliance Monitoring and Material Noncompliance.

§49.19. Department Records; Application Log; IRS Filings.

§49.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

§49.21. Manner and Place of Filing All Required Documentation.

§49.22. Waiver and Amendment of Rules.

§49.23. Deadlines for Allocation of Housing Tax Credits. (§2306.6724).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804825
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 49. 2009 QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.23

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 49, §§49.1 - 49.23, concerning the 2009 Qualified Allocation Plan and Rules. The new sections are proposed in order to implement changes that will improve the 2009 Housing Tax Credit Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be more efficient communications with those who conduct regular business with the Department which will enhance the State's ability to provide decent, safe and affordable housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing

and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2009rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§49.1. Purpose and Authority; Program Statement; Allocation Goals.

(a) Purpose and Authority. The rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of Housing Tax Credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, (the "Code") as amended, provides for credits against federal income taxes for owners of qualified low-income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Chapter 2306, Subchapter DD, of the Texas Government Code, the Department is authorized to make Housing Credit Allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed this Qualified Allocation Plan (QAP) which is set forth in §§49.1 - 49.23 of this chapter. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, accessible, affordable rental housing in the private marketplace; maximize the number of suitable, accessible, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, accessible, affordable residential rental units by enabling the Rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of accessible affordable housing developments in rural and urban communities. (§2306.6701)

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula; to promote maximum utilization of the available tax credit amount; and to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is being built. The processes and criteria utilized to realize this goal are described in §§49.7, 49.8 and 49.9 of this chapter, without in any way limiting the effect or applicability of all other provisions of this title. (General Appropriation Act, Article VII, Rider 8(e))

§49.2. Coordination with Rural Agencies.

To ensure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to provide for sharing of information, efficient procedures, and fulfillment of Development requirements in rural areas, the Department will coordinate on existing, Rehabilitation, and New Construction housing Developments financed by TRDO-USDA; and will administer the Rural Regional Allocation with the Texas Office of Rural Community Affairs (ORCA). Through participation in hearings and meetings, ORCA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Regional Allocation. The Criteria will be approved by that Agency. To ensure that the Rural Regional Allocation receives a sufficient volume of eligible Applications, the Department and ORCA shall jointly implement outreach, training, and rural area capacity building efforts. (§2306.6723)

§49.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adaptive Reuse--The renovation or rehabilitation of an existing non-residential building or structure (e.g., school, warehouse, office, hospital, etc.), including physical alterations that modify the building's previous or original intended use. If any Units are built outside the original building footprint or foundation, the Development will be considered New Construction. The number of floors or stories may be increased in a building as long as the total number of Units for the Development does not exceed 80 Units in a Rural Area or 252 Units in an Urban Area.

(2) Administrative Deficiencies--The absence of information or inconsistent information in the Application as is required under §§49.5, 49.6, 49.8 and 49.9 of this chapter, unless determined by the Department as unable to be corrected.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest unless the entity is an experienced Developer as described in §49.9(h)(9)(D) of this chapter.

(4) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the Applicable Percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(5) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low-income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(6) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development (New Construction, Reconstruction, and/or Rehabilitation), as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) the greater of 9% or the current applicable percentage for 70% present value credits for new buildings, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department; or

(ii) 15 basis points over the current applicable percentage for 30% present value credits associated with acquisition and with qualified Tax-Exempt Bond Developments, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) The percentage indicated in the Agreement and Election Statement, if executed; or

(ii) The actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by the Code, §42(b) for the most current month; or

(iii) The percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(7) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a Housing Credit Allocation. (§2306.6702)

(8) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(9) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department, December 3, 2008 through February 27, 2009, as more fully described in §§49.8 - 49.12 of this chapter. For Tax-Exempt Bond Developments this period is the date the Volumes 1 and 2 are submitted or the date the reservation is issued by the Texas Bond Review Board, whichever is earlier.

(10) Application Round--The period beginning on the date the Department begins accepting Applications and continuing until all available Housing Tax Credits are allocated, but not extending past the last day of the calendar year. (§2306.6702). For purposes of this section, this definition applies to Housing Tax Credits allocated with the State Housing Credit Ceiling.

(11) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for Housing Tax Credits.

(12) Area--

(A) The geographic area contained within the boundaries of:

(i) An incorporated place; or

(ii) Census Designated Place (CDP) as established by the U.S. Census Bureau for the most recent Decennial Census.

(B) For Developments located outside the boundaries of an incorporated place or CDP, the Development shall take up the Area characteristics of the incorporated place or CDP whose boundary is nearest to the Development site.

(13) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(14) At-Risk Development--A Development that: (§2306.6702)

(A) has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under at least one of the following federal laws, as applicable:

(i) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §17151);

(ii) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. §1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(v) The Section 8 Additional Assistance Program for housing Developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) The Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486); or

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. §42); and

(B) Is subject to the following conditions:

(i) The stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years of July 31 of the year the Application is submitted); or

(ii) The federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted).

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development unless the redevelopment will include the same site.

(D) Developments must be at risk of losing all affordability from all of the financial benefits available on the Development, provided such benefit constitutes a subsidy, described in subparagraph (A) of this paragraph on the site. However, Developments that have an opportunity to retain or renew any of the financial benefit described in subparagraph (A) of this paragraph must retain or renew all possible financial benefit to qualify as an At-Risk Development.

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal.

(15) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than 8 feet; is self contained with a door; has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space. A den, study or other similar space that could reasonably function as a bedroom and meets this definition is considered a bedroom.

(16) Board--The governing Board of the Department. (§2306.004)

(17) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and Treasury Regulations, §1.42-6.

(18) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §49.14(a) of this chapter.

(19) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(20) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(21) Colonia--A geographic Area that is located in a county some part of which is within 150 miles of the international border of this state, that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that (§2306.581):

(A) Has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Water Code; or

(B) Has the physical and economic characteristics of a colonia, as determined by the Department.

(22) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §49.13 of this chapter and also referred to as the "commitment."

(23) Community Revitalization Plan--A published document under any name, approved and adopted by the local Governing Body by ordinance or resolution, that targets specific geographic areas for revitalization and development of residential developments.

(24) Competitive Housing Tax Credits--Tax credits available from the State Housing Credit Ceiling.

(25) Compliance Period--With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(26) Control--(including the terms "Controlling," "Controlled by", and/or "under common Control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(27) Controlling or Managing General Partner--a co-owner of a business who owns, controls, or holds with power to vote, 10% or more of the voting stock; can take actions that are binding on the other partners and, who is liable for all debts and other obligations of the venture as well as for the management and operation of the partnership.

(28) Cost Certification Procedures Manual--The manual produced, and amended from time to time, by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Housing Tax Credit Program.

(29) Credit Period--With respect to a building within a Development, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(30) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established by Chapter 2306, Texas Government Code, including Department employees and/or the Board. (§2306.004)

(31) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which states that the Development may be eligible to claim Housing Tax Credits without receiving an allocation of Housing Tax Credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the Department's determination as to the amount of tax credits necessary for the financial feasibility of the Development and its viability as a rent restricted Development throughout the extended use period. (§42(m)(1)(D))

(32) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services (which fee cannot exceed the limits identified in §49.9(d)(6)(B) of this chapter) and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(33) Development--A proposed qualified and/or approved low-income housing project, as defined by the Code, §42(g), for Adaptive Reuse, New Construction, reconstruction, or Rehabilitation, that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) Located on a single site or contiguous site; or

(B) Located on scattered sites and contain only rent-restricted units. (§2306.6702)

(34) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(35) Development Funding--Means:

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable Development. (§2306.004(4-a))

(36) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department. (§2306.6702)

(37) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and is to be under control pursuant to §49.9(h)(7)(A) of this chapter.

(38) Development Team--All Persons or Affiliates thereof that play a role in the Development, construction, Rehabilitation, management and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(39) Disaster Area--An area that has been declared as a disaster pursuant to §418.014 of the Texas Government Code.

(40) Economically Distressed Area--Consistent with §17.921 of Texas Water Code, an Area in which:

(A) Water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;

(B) Financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) An established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

(41) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42.

(42) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee as set forth in Chapter 2306 of the Texas Government Code. (§2306.1112)

(43) Existing Residential Development--Any Development Site which contains 4 or more existing residential Units at the time the Volume I is submitted to the Department.

(44) Extended Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(45) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(46) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(47) Governing Body--An elected city or county entity that is responsible for the creation, implementation and/or enforcement of local rules and laws.

(48) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(49) Governmental Instrumentality--A legal entity such as a housing authority of a city or county, a housing finance corporation, or a municipal utility, which is created by a local political subdivision under statutory authority and which instrumentality is authorized to transact business for the political subdivision.

(50) Grant--Financial assistance that is awarded in the form of money to a housing sponsor or Development for a specific purpose and that is not required to be repaid. A Grant includes a forgivable loan. (§2306.004)

(51) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for the equity or debt financing for the Development.

(52) Historically Underutilized Businesses (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(53) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating Housing Tax Credits pursuant to the Code, §42. For the purposes of this chapter, the Department is the sole "Housing Credit Agency" of the State of Texas.

(54) Housing Credit Allocation--An allocation by the Department to a Development Owner for a specific Application of Housing Tax Credits in accordance with the provisions of this chapter.

(55) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period and which it allocates to the Development.

(56) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the Housing Tax Credit Program, pursuant to the Code, §42. (§2306.6702)

(57) HUD--The United States Department of Housing and Urban Development, or its successor.

(58) Ineligible Building Types--Those Developments which are ineligible, pursuant to this QAP, for funding under the Housing Tax Credit Program, as follows:

(A) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential Development. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living.

(B) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments with any Units having more than two bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such.

(D) Any Development with building(s) with four or more stories that does not include an elevator.

(E) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments proposing more than 70% two-bedroom Units.

(F) Any Development that violates the Integrated Housing Rule of the Department, §1.15 of this title.

(G) Any Development located in an Urban Area involving any New Construction of additional Units (other than a Qualified Elderly Development, a Development composed entirely of single family dwellings, and certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) in which any of the designs in clauses (i) - (iv) of this subparagraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings. For Intergenerational Housing Applications, the percentages in this subparagraph do not apply to buildings that are restricted by the age requirements of a Qualified Elderly Development. An Application may reflect a total of Units for a given bedroom size greater than the percentages in clauses (i) - (iv) of this subparagraph to the extent that the increase is only to reach the next highest number divisible by four.

(i) More than 30% of the total Units are one bedroom Units; or

(ii) More than 55% of the total Units are two bedroom Units; or

(iii) More than 40% of the total Units are three bedroom Units; or

(iv) More than 5% of the total Units in the Development with four or more bedrooms.

(H) Any Development that includes age restricted units that are not consistent with the Intergenerational Housing definition and policy or the definition of a Qualified Elderly Development.

(I) Any Development that contains residential Units either designated for a single occupational group or violates the general public use requirement under Treasury Regulation §1.42-9.

(59) Intergenerational Housing--Housing that includes specific Units that are restricted to the age requirements of a Qualified Elderly Development and specific Units that are not age restricted in the same Development that:

(A) Have separate and specific buildings exclusively for the age restricted Units;

(B) Have specific leasing offices and leasing personnel for the age restricted Units;

(C) Have separate and specific entrances, and other appropriate security measures for the age restricted Units;

(D) Provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) Share the same Development Site;

(F) Are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) Meet the requirements of the federal Fair Housing Act.

(60) IRS--The Internal Revenue Service, or its successor.

(61) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42. (§2306.6702)

(62) Local Political Subdivision--A county or municipality (city) in Texas. For purposes of §49.9(i)(5) of this chapter, a local political subdivision may act through a Government Instrumentality such as a housing authority, housing finance corporation, or municipal utility even if the Government Instrumentality's creating statute states that the entity is not itself a "political subdivision."

(63) Low-Income Unit--sometimes referred to as a tax credit Unit, that is a Unit that is income and rent restricted at no greater than 60% of AMGI and is included in the Applicable Fraction for the Housing Tax Credit program.

(64) Material Noncompliance--As defined in Chapter 60, Subchapter A of this title.

(65) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin. (§2306.6734)

(66) Neighborhood Organization--An organization that is composed of persons living near one another within the organization's defined boundaries for the neighborhood and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. A neighborhood organization includes a homeowners' association or a property owners' association. (§2306.001(23-a))

(67) Net Rentable Area (NRA)--The unit space that is available exclusively to the tenant and is typically heated and cooled by a mechanical HVAC system. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(68) New Construction--Any construction of a Development or a portion of a Development that does not meet the definition of Rehabilitation (which includes Reconstruction).

(69) ORCA--Office of Rural Community Affairs, as established by Chapter 487 of Texas Government Code.

(70) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(71) Persons with Disabilities--A person who:

(A) Has a physical, mental or emotional impairment that:

(i) Is expected to be of a long, continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that the disability could be improved by more suitable housing conditions;

(B) Has a developmental disability, as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002); or

(C) Has a disability, as defined in 24 CFR §5.403.

(72) Persons with Special Needs--Persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(73) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in this chapter. (§2306.6704)

(74) Pre-Application Acceptance Period--That period of time during which Competitive Housing Tax Credit Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(75) Principal--The term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a 10% or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a 10% or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(76) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(77) Qualified Allocation Plan (QAP)--This Plan as adopted.

(78) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(79) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with the Code, §42(d)(5)(C)(ii).

(80) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) Is intended for, and solely occupied by, individuals 62 years of age or older; or

(B) Is intended and operated for occupancy by at least one individual 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals 55 years of age or older. (See 42 U.S.C. §3607(b))

(81) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(82) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low-income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the Set-Asides, including, but not limited to, the nonprofit Set-Aside, the At-Risk Development Set-Aside and the TRDO-USDA Allocation. (§2306.6729)

(83) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary):

(A) Holds a controlling interest in the Development proposed to be financed from the nonprofit allocation pool (§2306.6729); and

(B) Owns an interest in the Development and materially participates (within the meaning of the Code, §469(h), as it may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5). (§2306.6729)

(84) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Housing Tax Credit Program.

(85) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the reconstruction of a Development on the Development Site, but does not include Adaptive Reuse. Rehabilitation includes repairs necessary to correct the results of deferred maintenance, the replacement of principal fixtures and components, improvements to increase the efficient use of energy, and installation of security devices. Reconstruction, for these purposes, includes the demolition of one or more residential buildings in an Existing Residential Development and the re-construction of the Units on the Development Site. Developments proposing Adaptive Reuse or proposing to increase the total number of Units in the Existing Residential Development are not considered Rehabilitation or reconstruction.

(86) Related Party--As defined, (§2306.6702)

(A) The following individuals or entities:

(i) The brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573, Texas Government Code;

(ii) A person and a corporation, if the person owns more than 50% of the outstanding stock of the corporation;

(iii) Two or more corporations that are connected through stock ownership with a common parent possessing more than 50% of:

(I) The total combined voting power of all classes of stock of each of the corporations that can vote;

(II) The total value of shares of all classes of stock of each of the corporations; or

(III) The total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) A grantor and fiduciary of any trust;

(v) A fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) A fiduciary of a trust and a beneficiary of the trust;

(vii) A fiduciary of a trust and a corporation if more than 50% of the outstanding stock of the corporation is owned by or for:

(I) The trust; or

(II) A person who is a grantor of the trust.

(viii) A person or organization and an organization that is tax-exempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) A corporation and a partnership or joint venture if the same persons own more than:

(I) 50% of the outstanding stock of the corporation; and

(II) 50% of the capital interest or the profits' interest in the partnership or joint venture.

(x) An S corporation and another S corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xi) An S corporation and a C corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xii) A partnership and a person or organization owning more than 50% of the capital interest or the profits' interest in that partnership; or

(xiii) Two partnerships, if the same person or organization owns more than 50% of the capital interests or profits' interests.

(B) Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(87) Residential Rental Development--For purposes of this definition, Residential Rental Development does not include: hotels, motels dormitories, fraternity or sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, trailer parks and courts for use on a transient basis. Residential Rental Development means:

(A) A property that meets specific requirements including occupancy of Low-Income Tenants during the affordability period when Units must be continually rented or available for rent;

(B) A building or structure, together with functionally related and subordinate facilities, containing one or more Units that are available to members of the general public; and

(C) A property that does not provide continual or frequent nursing, medical or psychiatric services.

(88) Rules--The Department's Housing Tax Credit Program Qualified Allocation Plan and Rules as presented in this chapter.

(89) Rural Area--An Area that is located (this definition is not the same as Rural Projects as defined in §520 of the Housing Act of 1949 for purposes of determining rural income as described in H.R 3221):

(A) Outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office or the United States Department of Agriculture (TRDO-USDA), other than an Area that is located in a municipality with a population of more than 50,000. (§2306.004)

(90) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural New Construction Developments with more than 80 Units.

(91) Selection Criteria--Criteria used to determine housing priorities of the State under the Housing Tax Credit Program as specifically defined in §49.9(i) of this chapter.

(92) Set-Aside--A reservation of a portion of the available Housing Tax Credits under the State Housing Credit Ceiling to provide financial support for specific types of housing or geographic locations or serve specific types of Applications or Applicants as permitted by the Qualified Allocation Plan on a priority basis. (§2306.6702)

(93) Single Room Occupancy(SRO)--A single efficiency unit that contains sanitary facilities but may not include food preparation facilities and is intended for occupancy by one person.

(94) State Housing Credit Ceiling--The limitation on the aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3)(C) and/or additonal ceiling provided by The Housing and Economic Recovery Act of 2008, H.R 3221.

(95) Student Eligibility--Per the Code, §42(i)(3)(D), A Unit shall not fail to be treated as a low-income Unit merely because it is occupied:

(A) By an individual who is:

(i) A student and receiving assistance under Title IV of the Social Security Act (42 U.S.C. §§601 et seq.), or

(ii) Enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) Entirely by full-time students if such students are:

(i) Single parents and their children and such parents and children are not dependents (as defined by the Code §152) of another individual, or

(ii) Married and file a joint return.

(96) Special Management Districts--Those districts named under Chapters 3801 to 3853, Texas Special District Local Laws Code, Subtitle C.

(97) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services, to more stable, productive lives by offering residents an array of supportive services.

(98) Tax-Exempt Bond Development--A Development requesting or having been awarded Housing Tax Credits and which receives a portion of its financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(99) Third Party--A Third Party is a Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor; or

(B) An Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor; or

(C) Receiving any portion of the fees from the Development.

(100) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §49.9(h) of this chapter. (§2306.6702)

(101) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of Housing Tax Credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(102) TRDO-USDA--Texas Rural Development Office (TRDO) of the United States Department of Agriculture (USDA) serving the State of Texas (also known as USDA Rural Development and formerly known as TxFmHA) or its successor.

(103) Unit--Any residential rental unit consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking (such as a microwave), and sanitation. (§2306.6702)

(104) Urban Area--The Area that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than an Area described in paragraph (89)(B) of this section or eligible for funding as described in paragraph (89)(C) of this section.

(105) Urban Core--A compact and contiguous geographical area composed of census tracts of a municipality in which at least 90 percent of the land is used or zoned for commercial purposes and that has historically been the primary location in the municipality where business has been transacted, as well as those census tracts that are contiguous to such areas.

§49.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service and/or The Housing and Economic Recovery Act of 2008, H.R. 3221. The Department shall publish each such determination in the Texas Register within 30 days after the receipt of such information as is required for that purpose by the Internal Revenue Service. The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. As permitted by the Code, §42(h)(4), Housing Credit Allocations made to Tax-Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§49.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

(a) Ineligibility. An Application is ineligible if:

(1) The Applicant, Development Owner, Developer or Guarantor has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or (§2306.6721(c)(2))

(2) The Applicant, Development Owner, Developer or Guarantor has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline; or

(3) The Applicant, Development Owner, Developer or Guarantor at the time of Application is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) The Applicant, Development Owner, Developer or Guarantor with any past due audits has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the Application is submitted; or

(5) (§2306.6703(a)(1)). At the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) A member of the Board; or

(B) The Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over Housing Tax Credits employed by the Department.

(6) (§2306.6703(a)(2)). The Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless:

(A) The Applicant proposes to maintain for a period of 30 years or more 100% of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50% of the Area Median Gross Income, adjusted for family size; and

(B) At least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or

(7) The Development is located in a municipality or in a valid Extra Territorial Jurisdiction (ETJ) of a municipality, or if lo-

cated completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the reservation is made by the Texas Bond Review Board) unless the Applicant: (§2306.6703(a)(4))

(A) Has obtained prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development; and

(B) Has included in the Application a written statement of support from that Governing Body. This statement must reference this rule and authorize an allocation of Housing Tax Credits for the Development;

(C) For purposes of this paragraph, evidence under subparagraphs (A) and (B) of this paragraph must be received by the Department no later than April 1, 2009 (or for Tax-Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be considered) and may not be more than one year old from the date the Volume 1 is submitted to the Department; or

(8) The Applicant proposes to construct a new Development proposing New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) that is located one linear mile (measured by a straight line on a map) or less from a Development that: (§2306.6703(a)(3))

(A) Serves the same type of household as the new Development, regardless of whether the Development serves families, elderly individuals, or another type of household (Intergenerational Housing is not a type of household as it relates to this restriction); and

(B) Has received an allocation of Housing Tax Credits (including Tax-Exempt Bond Developments) for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Volume I is submitted); and

(C) Has not been withdrawn or terminated from the Housing Tax Credit Program.

(D) An Application is not ineligible under this paragraph if:

(i) The Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.); or

(ii) The Development is located in a county with a population of less than one million; or

(iii) The Development is located outside of a metropolitan statistical area; or

(iv) The local government where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph. For purposes of this clause, evidence of the local government vote or evidence required by this subparagraph must be received by the Department no later than April 1, 2009 (or for Tax-Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be committed) and may not be more than one year old.

(E) In determining the age of an existing Development as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §49.9(j) of this chapter.

(9) A Development is proposed to be located adjacent to or within 300 feet of a sexual-orirented business. For purposes of this paragraph, a sexual-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

(10) A submitted Application has an entire Volume of the Application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review can not reasonably be performed by the Department, as determined by the Department. If an Application is determined ineligible pursuant to this subsection, the Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibly will be included in the termination letter to the Applicant.

(b) Disqualification and Debarment. The Department will disqualify an Application, and/or debar a Person, if it is determined by the Department that any issues identified in the paragraphs of this subsection exist. The Department may debar a Person for one year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines the facts warrant it. Causes for disqualification and debarment include: (§2306.6721)

(1) The provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or

(2) The Applicant, Development Owner, Developer or Guarantor or anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entities that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA (or any other document containing an Extended Housing Commitment) or the program rules in effect for such property as further described in Chapter 60 of this title on May 1, 2009 for Competitive Housing Tax Credit Applications or for Tax-Exempt Bond Development Applications or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the Application is submitted (§2306.6721(c)(3)); or

(3) The Applicant, Development Owner, Developer, or any Guarantor, anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entity that is active in the ownership or Control has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department; or

(4) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to pay in full any fees or penalties within 30 days of when they were billed by the Department, as further described in §49.20 of this chapter; or

(5) An Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or Control of the proposed Development, including a General Partner or contractor, and

a Principal or Affiliate of a General Partner or contractor, or an individual employed as a consultant, lobbyist or attorney by an Applicant or a Related Party, communicates with any Board member during the period of time beginning on the date Applications are filed in an Application Round and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, unless the communication takes place at any board meeting or public hearing held with respect to that Application but not during a recess or other non-record portion of the meeting or hearing. Communication with Department staff must be in accordance with §49.9(b) of this chapter; violation of the communication restrictions of §49.9(b) is also a basis for disqualification and/or debarment. (§2306.1113)

(6) It is determined by the Department's General Counsel that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application.

(7) Applicants may be ineligible as further described in this section.

(8) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully deobligated due to a failure to meet contractual obligations during the 12 months prior to the submission of the applications.

(9) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose pre-development award from the Department has not been repaid for the Development at the time of Carryover Allocation or Bond closing.

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this chapter, the Department may not allocate tax credits to a Development proposed by an Applicant if the Department determines that: (§2306.223)

(1) The Development is not necessary to provide needed decent, safe, and sanitary housing at rental prices that individuals or families of low and very low-income or families of moderate income can afford;

(2) The Development Owner undertaking the proposed Development will not supply well-planned and well-designed housing for individuals or families of low and very low-income or families of moderate income;

(3) The Development Owner is not financially responsible;

(4) The Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) Is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) Has breached a contract with a public agency and failed to cure that breach; or

(C) Misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(5) The financing of the housing Development is not a public purpose and will not provide a public benefit; and/or

(6) The Development will be undertaken outside the authority granted by this chapter to the Department and the Development Owner.

(d) Representation by Former Board Member or Other Person. (§2306.6733)

(1) A former Board member or a former executive director, deputy executive director, director of multifamily finance production, director of portfolio management and compliance, director of real estate analysis or manager over Housing Tax Credits previously employed by the Department may not:

(A) For compensation, represent an Applicant or one of its Related Parties for an allocation of tax credits before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceased; or

(B) Represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceased.

(2) A Person commits a criminal offense if the Person violates §2306.6733. An offense under this section is a Class A misdemeanor.

(e) Due Diligence, Sworn Affidavit. In exercising due diligence in considering information of possible ineligibility, possible grounds for disqualification and debarment, Applicant and Development standards, possible improper representation or compensation, or similar matters, the Department may request a sworn affidavit or affidavits from the Applicant, Development Owner, Developer, Guarantor, or other Persons addressing the matter. If an affidavit determined to be sufficient by the Department is not received by the Department within seven business days of the date of the request by the Department, the Department may terminate the Application.

(f) Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. An Applicant or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) - (e) of this section will be notified in accordance with the Administrative Deficiency process described in §49.9(d)(4) of this chapter. They may also utilize the appeals process described in §49.17(b) of this chapter. (§2306.6721(d))

§49.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations on Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

(a) Floodplain. Any Development proposing New Construction or Reconstruction and located within the 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with

jurisdiction identifying the 100 year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation or Adaptive Reuse, with the exception of Developments with federal funding assistance from HUD or TX USDA-RHS, will be permitted in the 100 year floodplain unless they already meet the requirements established in this subsection for New Construction.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §49.3(56) of this chapter will not be considered for allocation of tax credits.

(c) Scattered Site Limitations. Consistent with §49.3(32) of this chapter, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units. Tax-Exempt Bond Developments are permitted to be located on multiple sites consistent with Chapter 1372, Texas Government Code and as further clarified by the Texas Bond Review Board.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the affordability period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim Housing Tax Credits. The Department will limit the allocation of tax credits to no more than $1.4 million per Development. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor; Competitive Housing Tax Credits approved by the Board during the 2009 calendar year, including commitments from the 2009 Credit Ceiling and forward commitments from the 2010 Credit Ceiling, are applied to the credit cap limitation for the 2009 Application Round. In order to evaluate this $2 million limitation, Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must provide the documentation required in the Application with regard to this requirement. In order to encourage the capacity enhancement of inexperienced Developers, the Department will prorate the credit amount allocated in situations where an Application is submitted in the either the Rural Regional Allocation or the Urban Regional Allocation. The Department will prorate the credits based on the percentage ownership, if there is an ownership interest, or the proportional percentage of the Developer fee received, if this applies to a Developer without an ownership interest. To be considered for this provision, a copy of a Joint Venture Agreement and narrative on how this builds the capacity of the inexperienced Developers is required. Tax-Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. The limitation does not apply (§2306.6711(b)):

(1) To an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) To the provision by an entity of "qualified commercial financing" within the meaning of the Code (without regard to the 80% limitation thereof);

(3) To a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds, grants or social services; and

(4) To a Development Consultant with respect to the provision of consulting services, provided the Development Consultant fee received for such services does not exceed 10% of the fee to be paid to the Developer (or 20% for Qualified Nonprofit Developments), or $150,000, whichever is greater.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units if the Development involves Housing Tax Credits. The minimum Development size will be 4 Units if the funding source only involves the Housing Trust Fund or HOME Program.

(2) Rural Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) will be limited to 80 Units (this includes individual Tax-Exempt Bond Developments). Rural Developments involving only Rehabilitation (excluding reconstruction) do not have a size limitation.

(3) Urban Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings), in the Competitive Housing Tax Credit Application Round will be limited to 252 total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 restricted and total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation, Reconstruction, and New Construction. Only Developments that consist solely of acquisition/Rehabilitation or Rehabilitation may exceed the maximum Unit restrictions.

(4) For Applications that are proposing an additional phase to an existing tax credit Development; that are otherwise adjacent to an existing tax credit Development; or that are proposing a Development on a contiguous site to another Application awarded in the same program year, the combined Unit total for the existing and proposed Developments may not exceed the maximum allowable Development size set forth in this subsection unless:

(A) the first phase of the Development has been completed and has attained Sustaining Occupancy (as defined in §1.31 of this title) for at least six months; or

(B) a resolution from the Governing Body of the city or county in which the proposed Development is located, dated on or before the date the Application is submitted, is submitted with the Application. Such resolution must state that there is a need for additional Units and that the Governing Body has reviewed a market study, the conclusion of which supports the need for additional Units; or

(C) the proposed Development is intended to provide replacement of previously existing affordable Units on the Development Site or that were originally located within a one mile radius from the Development Site; provided, however, the combined number of Units in the proposed Development may not exceed the number of Units being replaced. Documentation of such replacement units must be provided.

(f) Limitations on the Location of Developments. Staff will only recommend, and the Board may only allocate, Housing Tax Credits from the State Housing Credit Ceiling to more than one Development from the State Housing Credit Ceiling in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department. If the Board forward commits credits from the following year's State Housing Credit Ceiling, the Development is considered to be in the calendar year in which the Board votes, not in the year of the State Housing Credit Ceiling. This limitation applies only to communities contained within counties with populations exceeding one million (which for calendar year 2009 are Harris, Dallas, Tarrant and Bexar Counties). For purposes of this chapter, any

two sites not more than one linear mile apart are deemed to be "in a single community." (§2306.6711(f)). This restriction does not apply to the allocation of Housing Tax Credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Development Applications under review and existing Tax-Exempt Bond Developments in the Department's portfolio. (§2306.67021)

(g) Limitations of Development in Certain Census Tracts. Staff will not recommend and the Board will not allocate Housing Tax Credits for a Competitive Housing Tax Credit or Tax-Exempt Bond Development located in a census tract that has more than 30% Housing Tax Credit Units per total households in the census tract as established by the U.S. Census Bureau for the most recent Decennial Census unless the Applicant:

(1) In an Area whose population is less than 100,000;

(2) Proposes only reconstruction or Rehabilitation (excluding New Construction of non-residential buildings); or

(3) Submits to the Department an approval of the Development referencing this rule in the form of a resolution from the Governing Body of the appropriate municipality or county containing the Development. For purposes of this paragraph, evidence of the local government approval must be received by the Department no later than April 1, 2009 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Development Applications no later than 14 days before the Board meeting where the credits will be committed). These ineligible census tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report.

(h) Developments Proposing to Qualify for a 30% increase in Eligible Basis. Staff will only recommend a 30% increase in Eligible Basis (pargraphs (3) and (4) of this subsection only apply to Competitive Housing Tax Credits allocated from the State Credit Ceiling) if:

(1) The Development proposing to build in a Hurricane Rita Gulf Opportunity Zone (Rita GO Zone), which was designated as a Difficult to Develop Area as determined by H.B. 4440, is able to be placed in service by December 31, 2010 (or date as revised by the Internal Revenue Service) as certified in the Application;

(2) The Development is located in a Qualified Census Tract that has less than 40% Housing Tax Credit Units per households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. Developments located in a Qualified Census Tract that has in excess of 40% Housing Tax Credit Units per households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to the Code, §42(d)(5)(C), unless the Development is proposing only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings). These ineligible Qualified Census Tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report;

(3) The Development qualifies for and receives Renewable Energy Tax Credits. For purposes of this paragraph, the Application will be required to include evidence that an application for the Renewable Energy Tax Credits has been submitted to the appropriate agency and Applicant will be required to show proof of receipt of the Renewable Energy Tax Credits at the time of Cost Certification; or

(4) Pursuant to the authority granted by H.R. 3221, the Development meets one of the criteria described in subparagraphs (A) - (D) of this paragraph:

(A) Rural Developments located in a census tract that has not received an award of Housing Tax Credits or Tax-Exempt Bonds (serving the same population type as proposed) in the last five years from the date of the Application Acceptance Period;

(B) Developments proposing at least 50% of Units for Supportive Housing;

(C) Developments proposing to provide 10% of the Low-Income Units, that will serve individuals and families at or below 30% of AMGI, in excess of those that are proposed in §49.9(i)(3) of this chapter; or

(D) Developments proposed in High Opportunity Areas as provided in clauses (i) - (iv) of this subparagraph:

(i) A Development that is proposed to be located within one-quarter mile of existing public transportation or commuter rail transportation stations that are accessible to all residents including Persons with Disabilities;

(ii) A Development that is proposed to be located in a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located;

(iii) A Development (serving families with children) that is proposed to be located in a school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or

(iv) A Development that is proposed in a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2009 Housing Tax Credit Site Demographic Characteristics Report).

(i) Rehabilitation Costs. Developments involving Rehabilitation must establish that the Rehabilitation will substantially improve the condition of the housing and will involve at least $15,000 per Unit in direct hard costs (including site work, contingency, contractor profit, overhead and general requirements) unless financed with TRDO-USDA in which case the minimum is $9,000.

(j) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department.

(k) Appeals and Administrative Deficiencies for Site and Development Restrictions. An Application or Development found to be in violation under subsections (a) - (j) of this section will be notified in accordance with the Administrative Deficiency process described in §49.9(d)(4) of this chapter. They may also utilize the appeals process described in §49.17(b) of this chapter.

§49.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

(a) Regional Allocation Formula. §2306.1115 as required by §2306.111(d), Texas Government Code, the Department uses a regional distribution formula developed by the Department and commented on by the public to distribute credits from the State Housing Credit Ceiling to all Urban Areas and Rural Areas. This formula establishes separate targeted tax credit amounts for Rural Areas and Urban Areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's web site. The regional allocation for Rural Areas is referred to as the Rural Regional Allocation and the regional allocation for Urban Areas is referred to as the Urban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition. The Regional Allocation target will reflect that at least 20% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments in Rural Areas with a minimum of $500,000 for each Uniform State Service Region. (§2306.111(d)(3))

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies (§2306.111(d)):

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Qualified Nonprofit Development applying for this Set-Aside. If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the controlling managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement. (§2306.6729 and §2306.6706(b))

(2) At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which are financed through TRDO-USDA, that meet the definition of a Rural Development, do not exceed 80 Units if proposing any New Construction (excluding New Construction of non-residential buildings), and have filed an "Intent to Request 2009 Housing Tax Credits" form by the Pre-Application submission deadline. (§2306.111(d)(2) If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Development Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region. Developments financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program, in whole or in part, will not be considered under this Set-Aside. Any Rehabilitation or Reconstruction of an existing §515 Development that retains the §515 loan and restrictions will be considered under the At-Risk Development and TRDO-USDA Set-Asides, unless such Development is also financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program. Commitments of 2009 Competitive Housing Tax Credits issued by the Board in 2009 will be applied to each Set-Aside, Rural Regional Allocation, Urban Regional Allocation and/or TRDO-USDA Set-Aside for the 2009 Application Round as appropriate.

(3) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-Aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional formula required under subsection (a) of this section. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments designated as At-Risk Developments as defined in §49.3(14) of this chapter. (§2306.6714). To qualify as an At-Risk Development, the Applicant must provide evidence that it either is not eligible to renew, retain or preserve any portion of the financial benefit described in §49.3(14)(A) of this chapter, or provide evidence that it will renew, retain or preserve the financial benefit described in §49.3(14)(A) of this chapter; and must have filed an "Intent to Request 2009 Housing Tax Credits" form by the Pre-Application submission deadline. Up to 5% of the State Credit Ceiling associated with this Set-Aside may be given priority to Rehabilitation Developments funded with TRDO.

(c) Redistribution of Credits. (§2306.111(d)). If any amount of Housing Tax Credits remain after the initial commitment of Housing Tax Credits among the Set-Asides, Rural Regional Allocation and Urban Regional Allocation, the Department may redistribute the credits amongst the different regions and Set-Asides depending on the quality of Applications submitted as evaluated under the factors described in §49.9(d) of this chapter, the need to most closely achieve regional allocation goals and then the level of demand exhibited in the Uniform State Service Regions during the Application Round, except that, if there are any tax credits set aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after the allocation under §49.9(d)(5)(C) of this chapter, those tax credits shall be made available in any other Rural Area in the state, first, and then to Developments in Urban areas of any uniform state service region. (§2306.111(d)(3)). As described in subsection (b)(1) and (2) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§49.8. Pre-Applications for Competitive Housing Tax Credits: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results. (§2306.6704)

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §49.20 of this chapter. Only one Pre-Application may be submitted by an Applicant for each site under the State Housing Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized though not required to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be Administrative Deficiencies. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Communication with the Department. Applicants that submit a Pre-Application are restricted from communication with Department staff as provided in §49.9(b) of this chapter. (§2306.1113)

(c) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria. Applications that are associated with a TRDO-USDA Development are not exempt from Pre-Application and are eligible to compete for the Pre-Application points further outlined in §49.9(i)(14) of this chapter. Pre-Applications that are found to have Administrative Deficiencies will be handled in accordance with §49.9(d)(4) of this chapter. Department review at this stage is limited and not all issues of eligibility and threshold are reviewed at Pre-Application. Acceptance by staff of a Pre-Application does not ensure that an Applicant satisfies all Application eligibility, Threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of Pre-Application.

(d) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer

upon the Applicant any rights to which it would not otherwise be entitled. The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Certification of Pre-Application Itemized Self-Score". The Applicant may not change the Self-Score unless requested by the Department in a Deficiency Notice;

(2) Evidence of property control through February 27, 2009 as evidenced by the documentation required under §49.9(h)(7)(A) of this chapter; and

(3) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under subparagraph (A) of this paragraph must be made by the deadlines described in that clause; notifications under subparagraph (C) of this paragraph must be made prior to the close of the Pre-Application Acceptance Period. (§2306.6704) Evidence of notification must meet the requirements identified in subparagraph (B) of this paragraph to all of the individuals and entities identified in subparagraph (B) of this paragraph. (§2306.6704)

(A) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(i) No later than December 5, 2008, the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Pre-Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format.

(ii) If no reply letter is received from the local elected officials by January 1, 2009, then the Applicant must certify to that fact in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(iii) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of as of Pre-Application Submission in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(B) Not later than the date the Pre-Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism in the format required in the "Pre-Application Notification Template" provided in the Pre-Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of Notification is required in the form of a certification in the "Pre-Application Notification Certification Form" provided in the Pre-Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in clauses (i) - (ix) of this paragraph, in the event that the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by the recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in subparagraph (A)(iii) of this paragraph;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the Governing Body of any municipality containing the Development;

(vi) Presiding officer of the Governing Body of the county containing the Development;

(vii) All elected members of the Governing Body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Statement of whether the Development proposes New Construction, reconstruction, Adaptive Reuse or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing, or elderly);

(vi) The approximate total number of Units and approximate total number of low-income Units;

(vii) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(viii) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur; and

(ix) The expected completion date if credits are awarded.

(e) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in subsection (d) of this section and §49.9(i)(14) of

this chapter, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission Log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application.

§49.9. Application: Submission; Ex Parte Communications; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2010 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §49.20 of this chapter, to the Department during the Application Acceptance Period. Only complete Applications will be accepted. All required volumes must be appropriately bound as required by the Application Submission Procedures Manual and fully complete for submission with all required copies and received by the Department not later than 5:00 p.m. on the date the Application is due. A bookmarked electronic copy of all required volumes and exhibits, unless otherwise indicated in the Application Submission Procedures Manual, must be submitted in the format of a single file presented in the order they appear in the hard copy of the complete Application on a CD-R clearly labeled with the report type, Development name, and Development location is required for submission and must be received by the Department not later than 5:00 p.m. on the date the Application is due. Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including ineligibility criteria, site and development restrictions, and threshold and selection criteria documentation. (§2306.6708) An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any Set-Asides, increase the requested credit amount, or revise the Unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in §49.3(2) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §49.17(d) of this chapter.

(b) Ex Parte Communications.

(1) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, a member of the Board may not communicate with the following Persons:

(A) an Applicant or Related Party; and

(B) any Person who is:

(i) active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(I) a General Contractor; and

(II) a Developer; and

(III) a General Partner, Principal or Affiliate of a General Partner or General Contractor; or

(ii) employed as a consultant, lobbyist, or attorney by an Applicant or a Related Party.

(2) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, an employee of the Department may communicate about any Application with the following Persons:

(A) the Applicant or a Related Party; and

(B) any Person who is:

(i) active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(I) a General Partner or General Contractor; and

(II) a Developer; and

(III) a Principal or Affiliate of a General Partner or General Contractor; or

(ii) employed as a consultant, lobbyist or attorney by the Applicant or a Related Party.

(3) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the Internet, and must satisfy the following conditions:

(A) the communication must be restricted to technical or administrative matters directly affecting the Application;

(B) the communication must occur or be received on the premises of the Department during established business hours; and

(C) a record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(i) the date, time, and means of communication;

(ii) the names and position titles of the Persons involved in the communication and, if applicable, the Person's relationship to the Applicant;

(iii) the subject matter of the communication; and

(iv) a summary of any action taken as a result of the communication.

(4) Notwithstanding paragraphs (1) or (2) of this subsection, a Board member or Department employee may communicate without restriction with a Person listed in paragraphs (1) or (2) during any Board meeting or public hearing held with respect to the Application, but not during a recess or other non-record portion of the meeting or hearing.

(5) Paragraph (1) of this subsection does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(c) Adherence to Obligations. (§2306.6720), General Appropriation Act, Article VII, Rider 8(a)). All representations, undertakings and commitments made by an Applicant in the Application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such

Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, as stated in the representations and in accordance with the LURA. If a Development Owner does not produce the Development as represented in the Application; does not receive approval for an amendment to the Application by the Department prior to implementation of such amendment; or does not provide the necessary evidence for any points received by the required deadline:

(1) The Development Owner must provide a plan to the Department, for approval and subsequent implementation, that incorporates additional amenities to compensate for the non-conforming components; and

(2) The Board will opt either to terminate the Application and rescind the Commitment Notice, Determination Notice or Carryover Allocation Agreement as applicable or the Department must:

(A) Reduce the score for Applications for Competitive Housing Tax Credits that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development by up to ten points for the two Application Rounds concurrent to, or following, the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board.

(B) Prohibit eligibility to apply for Housing Tax Credits for a Tax-Exempt Bond Development that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development for up to 24 months from the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board, less any time delay caused by the Department.

(C) In addition to, or in lieu of, the penalty in subparagraph (A) or (B) of this paragraph, the Board may assess a penalty fee of up to $1,000 per day for each violation.

(3) For amendments approved administratively by the Executive Director, the penalties in paragraph (2) of this subsection will not be imposed.

(d) Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling. Applications submitted for competitive consideration under the State Housing Credit Ceiling will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §49.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Set-Aside and Selection Criteria Review. All Applications will first be reviewed as described in this paragraph. Applications will be confirmed for eligibility for Set-Asides. Then, each Application will be preliminarily scored according to the Selection Criteria listed in subsection (i) of this section. When a particular scoring criterion involves multiple points, the Department will award points to the proportionate degree, in its determination, to which a proposed Development complied with that criterion. As necessary to complete this process only, Administrative Deficiencies may be issued to the Applicant. This process will generate a preliminary Department score for every Application.

(2) Application Review Assessment. Each Application will be assessed based on either the Applicant's self-score or the Department's preliminary score, region, and any Set-Asides that the Application indicates it is eligible for, consistent with paragraph (5) of this subsection. Those Applications that appear to be most competitive will be reviewed in detail for Eligibility and Threshold Criteria during the Application Round.

(3) Eligibility and Threshold Criteria Review. Applications that appear to be most competitive will be evaluated for eligibility under §49.5(a)(7) - (9), (b) - (f), and §49.6 of this chapter. The remaining portions of the Eligibility Review under §49.5 of this chapter will be performed in the Compliance Evaluation and Eligibility Review as described under paragraph (7) of this subsection. The most competitive Applications will also be evaluated against the Threshold Criteria under subsection (h) of this section. The same portions of the Threshold Criteria review may be performed in the Underwriting Evaluation and Criteria review for financial feasibility by the Department's Real Estate Analysis Division as described under paragraph (6) of this subsection. Applications not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria. To the extent that the review of Threshold Criteria documentation, or submission of Administrative Deficiency documentation, alters the score assigned to the Application, an Applicant will be notified of its final score.

(4) Administrative Deficiencies. If an Application contains Administrative Deficiencies pursuant to §49.3(2) of this chapter which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Selection, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an email, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the email within 24 hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then for competitive Applications under the State Housing Credit Ceiling, five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. This Administrative Deficiency process applies to requests for information made by the Real Estate Analysis Division review.

(5) Subsequent Evaluation of Applications and Methodology for Award Recommendations to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division--in general these will be those Applications identified as most competitive and that meet the requirements of Eligibility and Threshold. This procedure will also be used in making recommendations to the Board as follows:

(A) Assignments will be determined by separately selecting the Applications with the highest scores in the At-Risk Set-Aside Statewide until the minimum requirements stated in §49.7(b) of this chapter are attained.

(B) Assignments will then be determined by selecting the Applications with the highest scores in the TRDO-USDA Allocation until the minimum requirements stated in §49.7(b) of this chapter are attained. If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region.

(C) Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments in each of the 26 sub-regions, regardless of Set-Aside, in accordance with the requirements under §49.7(a) of this chapter, without exceeding the credit amounts available for a Rural Regional Allocation and Urban Regional Allocation in each region. To the extent that Applications in the At-Risk and TRDO-USDA Set-Asides are not competitive enough within their respective Set-Asides, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region.

(D) If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after allocation under subparagraph (C) of this paragraph those tax credits shall then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the Region's Rural Allocation. (§2306.111(d)(3)). This will be referred to as the Rural collapse.

(E) If there are any tax credits remaining in any sub-region after the Rural collapse, in the Rural Regional Allocation or Urban Regional Allocation, they then will be combined and made available to the Application in the most underserved sub-region as compared to the sub-region's allocation. This will be referred to as the statewide collapse.

(F) Staff will ensure that at least 10% of the State Housing Credit Ceiling is allocated to Qualified Nonprofit Organizations to satisfy the Nonprofit Set-Aside. If 10% is not met, then the Department will add the highest scoring Application by a Qualified Nonprofit Organization statewide until the 10% Nonprofit Set-Aside is met. Staff will ensure that at least 20% of the State Housing Credit Ceiling is allocated to Rural Developments. If this 20% minimum is not met, then the Department will add the highest scoring Rural Development Application statewide until the 20% Rural Development Set-Aside is met. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban Regional Allocation. Funds for the Rural Regional Allocation or Urban Regional Allocation within a region, for which there are no eligible feasible Applications, will be redistributed as provided in §49.7(c) of this chapter, Redistribution of Credits. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §49.6(d) of this chapter, the Department will make its recommendation by selecting the Development(s) that most effectively satisfies(y) the Department's goals in meeting Set-Aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available Housing Tax Credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as necessary to ensure that all available Competitive Housing Tax Credits are allocated within the period required by law. (§2306.6710(a)-(f); §2306.111)

(6) Underwriting Evaluation and Criteria. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits. In determining an appropriate level of Housing Tax Credits, the Department shall, at a minimum, evaluate the cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous Housing Tax Credit allocations for the county in which the Development is to be located; if certifications are unavailable for the county, then the metropolitan statistical area in which the Development is to be located; or if certifications are unavailable under the county or the metropolitan statistical area, then the Uniform State Service Region in which the Development is to be located. Underwriting of a Development will include a determination by the Department, pursuant to the Code §42, that the amount of Housing Tax Credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified rent restricted housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any set-asides, increase their credit amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Real Estate Analysis Division to remedy an Administrative Deficiency as further described in §49.3(2) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §49.17(d) of this chapter. To the extent that the review of Administrative Deficiency documentation during this review alters the score assigned to the Application, Applicants will be re-notified of their final score. Receipt of feasibility points under subsection (i)(1) of this section does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division and conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive points under subsection (i)(1) of this section. (§2306.6710 and §2306.11)

(A) The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or General Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the General Contractor is an Affiliate of the Development Owner and both parties are claiming fees, General Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of Housing Tax Credits allocated with respect to any portion of costs which it deems excessive or unreasonable. Excessive or unreasonable costs may include Developer fee attributable to Related Party acquisition costs. The Department also may require bids or Third Party estimates in support of the costs proposed by

any Applicant. The Developer's fee limits will be calculated as follows:

(i) New construction pursuant to §42(b)(1)(A) U.S.C., the Developer fee cannot exceed 15% of the project's Total Eligible Basis, less Developer fees, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less; and

(ii) Acquisition/rehabilitation Developments that are eligible for acquisition credits pursuant to §42(b)(1)(B) U.S.C., the acquisition portion of the Developer fee cannot exceed 15% of the existing structures acquisition basis, less Developer fee if the Development proposes 50 total Units or more, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less, and will be limited to 4% credits. The rehabilitation portion of the Developer fee cannot exceed 15% of the total rehabilitation basis, less Developer fee if the Development proposes 50 total Units or more, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less.

(7) Compliance Evaluation and Eligibility Review. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division, in accordance with Chapter 60 of this title, and will be evaluated in detail for eligibility under §49.5(a) - (f) of this chapter.

(8) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns. Such inspection will evaluate the Development Site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TRDO-USDA Set-Aside, the Department may rely on the physical site inspection performed by TRDO-USDA.

(e) Evaluation Process for Tax-Exempt Bond Development Applications. Applications submitted for consideration as Tax-Exempt Bond Developments will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §49.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Eligibility and Threshold Criteria Review. All Tax-Exempt Bond Development Applications will first be reviewed as described in this paragraph. Tax-Exempt Bond Development Applications will be confirmed for eligibility under §49.5 and §49.6 of this chapter and Applications will be evaluated in detail against the Threshold Criteria. Tax-Exempt Bond Development Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting the Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the emai within 24 hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five business days. Failure to resolve all outstanding deficiencies by 5:00 p.m. on the fifth business day following the date of the deficiency notice will result in a penalty fee of $500 for each business day the deficiency remains unresolved. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination pursuant to §49.5(b)(4) of this chapter. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid. This Administrative Deficiency process applies equally to the Real Estate Analysis Division review and feasibility evaluation and the same penalty and termination will be assessed.

(3) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Tax-Exempt Bond Development Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits as further described in subsection (d)(6) of this section. Tax-Exempt Bond Development Applications will also be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60, Subchapter A, of this title.

(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(f) Evaluation Process for Rural Rescue Applications Under the 2010 Credit Ceiling. Applications submitted for consideration as Rural Rescue Applications pursuant to §49.10(c) of this chapter under the 2010 Credit Ceiling will be reviewed according to the process outlined in this subsection. A Rural Rescue Application, during any of these stages of review, may be determined to be ineligible as further described in §49.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Procedures for Intake and Review.

(A) Applications for Rural Rescue deals may be submitted between March 2, 2009 and November 15, 2009 and must be submitted in accordance with §49.21 of this chapter. A complete Application must be submitted at least 40 days prior to the date of the Board meeting at which the Applicant would like the Board to act on the proposed Development. Applications must include the full Application Fee as further described in §49.20(c) of this chapter. Applicants must submit documents in accordance with the procedures set out in the 2009 Application Submission Procedures Manual for Volumes I, II, III and IV. Volume IV, evidencing Selection Criteria, MUST be submitted.

(B) Applicants do not need to participate in the Pre-Application process outlined in §49.8 of this chapter, nor will they need to submit pre-certification documents identified in subsection (g) of this section.

(C) Applications will be processed on a first-come, first-served basis. Applications unable to meet all deficiency and underwriting requirements within 30 days of the request by the Department, will remain under consideration, but will lose their submission status and the next Application in line will be moved ahead in order to expedite those Applications most able to proceed. Applications for Rural Rescue will be processed and evaluated as described in this paragraph. Applications will be reviewed to ensure that the Application is eligible as a rural "rescue" Development as described in paragraph (2) of this subsection.

(D) Prior to the Development being recommended to the Board, TRDO-USDA must provide the Department with a copy of the physical site inspection report performed by TRDO-USDA, as provided in subsection (d)(8) of this section.

(2) Eligibility Review. All Rural Rescue Applications will first be reviewed as described in this paragraph and eligibility will be confirmed pursuant to §49.5 and §49.6 of this chapter and the criteria listed in subparagraphs (A) - (C) of this paragraph. Applications found to be ineligible will be notified.

(A) Applications must be funded through TRDO-USDA;

(B) Applications must able to provide evidence that the loan:

(i) has been foreclosed and is in the TRDO-USDA inventory; or

(ii) is being foreclosed; or

(iii) is being accelerated; or

(iv) is in imminent danger of foreclosure or acceleration; or

(v) is for an Application in which two adjacent parcels are involved, of which at least one parcel qualifies under clauses (i) - (iv) of this subparagraph and for which the Application is submitted under one ownership structure, one financing plan an for which there are no market rate units; and

(C) Applicants must be identified as in compliance with TRDO-USDA regulations.

(3) Threshold Review. Applications will be evaluated in detail against the Threshold Criteria. Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria.

(4) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria and a score will be assigned to the Application. The minimum score for Selection Criteria is not required to be achieved to be eligible.

(5) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies as further described in subsection (d)(4) of this section.

(6) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Rural Rescue Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits as further described in subsection (d)(6) of this section. Rural Rescue Development Applications will also be reviewed for evaluation of the previous participation by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60 of this title.

(7) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(8) Credit Ceiling and Applicability of this chapter. All Rural Rescue Applicants will receive their credit allocation out of the 2010 Credit Ceiling and therefore, will be required to follow the rules and guidelines identified in the 2010 Qualified Allocation Plan and Rules (QAP). However, because the 2010 QAP will not be in effect during the time period that the Rural Rescue Applications can be submitted, Applications submitted and eligible under the Rural Rescue Set-Aside will be considered by the Board to have satisfied the requirements of the 2010 QAP and are waived from 2010 QAP requirements that are changes from the 2009 QAP, to the extent permitted by statute.

(9) Procedures for Recommendation to the Board. Consistent with subsection (k) of this section, staff will make its recommendation to the Committee. The Committee will make commitment recommendations to the Board. Staff will provide the Board with a written, documented recommendation which will address at a minimum the financial and programmatic viability of each Application and a breakdown of which Selection Criteria were met by the Applicant. The Board will make its decision based on §49.10(a) of this chapter. Any award made to a Rural Rescue Development will be credited against the TRDO-USDA Set-Aside for the 2010 Application Round, as required under subsection (d)(5) of this section.

(10) Limitation on Allocation. No more than $350,000 in credits will be forward committed from the 2010 State Housing Credit Ceiling. To the extent Applications are received that exceed the maximum limitation, staff will prepare the award for Board consideration noting for the Board that the award would require a waiver of this limitation.

(g) Experience Pre-Certification Procedures. No later than 14 days prior to the close of the Application Acceptance Period for Competitive Housing Tax Credit Applications, an Applicant must submit the documents required in this subsection to obtain the required pre-certification. For Applications submitted for Tax-Exempt Bond Applications or Applications not applying for Competitive Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) all of the documents in this section must be submitted with the Application. Upon receipt of the evidence required under this section, a certification from the Department will be provided to the Applicant for inclusion in its Application(s). Evidence must show that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units (single family or multifamily) in the capacity of owner, General Partner or Developer. If a Public Housing Authority organized an entity for the purpose of developing residential units the Public Housing Authority shall be considered a Principal for the purpose of this requirement. If the individual requesting the certification was not the Development Owner, General Partner or Developer, but was the individual within one of those entities doing the work associated with the development of the Units (responsibility for work associated with the development of Units includes, but is not limited to, application submission, third-party engagement, post award activities, construction, cost certification, etc.), the individual must show that the units were successfully developed as required in paragraphs (1) and (2) of this subsection, and also provide written confirmation from the entity involved stating that the individual was the person responsible for the development. If rehabilitation experience is being claimed to qualify for an Application involving New Construction, then the rehabilitation must have been substantial and involved at least $12,000 of direct hard cost per unit.

(1) The term "successfully" is defined as acting in a capacity as the owner, General Partner, or Developer of:

(A) At least 100 residential units or, if less than 100 residential units, 80% of the total number of Units the Applicant is applying to build (e.g. you must have 40 units successfully built to apply for 50 Units); or

(B) At least 36 residential units if the Development is a Rural Development; or

(C) At least 25 residential units if the Development has 36 or fewer total Units.

(2) One or more of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(A) That the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion);

(B) That the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(C) The number of units completed or substantially completed.

(h) Threshold Criteria. The following Threshold Criteria listed in this subsection are mandatory requirements that must be submitted at the time of Application submission unless specifically indicated otherwise:

(1) Completion and submission of the Application, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (§2306.1111)

(2) Completion and submission of the Site Packet as provided in the Application.

(3) Set-Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding as required in the Application.

(4) Certifications. The "Certification Form" provided in the Application confirming the following items:

(A) A certification of the basic amenities selected for the Development. All Developments must meet at least the minimum threshold of points. These points are not associated with the selection criteria points in subsection (i) of this section. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to satisfy this requirement. Developments must provide a minimum number of common amenities in relation to the Development size being proposed. The amenities selected must be selected from clause (ii) of this subparagraph and made available for the benefit of all tenants. Developments proposing Rehabilitation (excluding Reconstruction) or proposing Single Room Occupancy will receive 1.5 points for each point item (do not round). Applications for non-contiguous scattered site housing, including New Construction, reconstruction, Adaptive Reuse, Rehabilitation, and single-family design, will have the threshold test applied based on the number of Units per individual site, and must submit a separate certification for each individual site under control by the Applicant. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §49.17(d) of this chapter and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost, or in the cancellation of a Commitment Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(i) Applications must meet a minimum threshold of points (based on the total number of Units in the Development) as follows:

(I) Total Units are less than 16, 0 points are required to meet Threshold for Single Room Occupancy and 1 point is required to meet threshold for all other Developments;

(II) Total Units are 16 to 24, 2 points are required to meet Threshold;

(III) Total Units are 25 to 40, 3 points are required to meet Threshold;

(IV) Total Units are 41 to 76, 6 points are required to meet Threshold;

(V) Total Units are 77 to 99, 9 points are required to meet Threshold;

(VI) Total Units are 100 to 149, 12 points are required to meet Threshold;

(VII) Total Units are 150 to 199, 15 points are required to meet Threshold; or

(VIII) Total Units are 200 or more, 18 points are required to meet Threshold.

(ii) Amenities for selection include those items listed in subclauses (I) - (XXV) of this clause. Both Developments designed for families and Qualified Elderly Developments can earn points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in subparagraphs (D) and (F) of this paragraph. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Spaces for activities must be sized appropriately to serve the anticipated population.

(I) Full perimeter fencing (2 points);

(II) Controlled gate access (1 point);

(III) Gazebo w/sitting area (1 point);

(IV) Accessible walking/jogging path separate from a sidewalk (1 point);

(V) Community laundry room with at least one front loading washer (1 point);

(VI) Barbecue grill and picnic table-at least one of each for every 50 Units (1 point);

(VII) Covered pavilion that includes barbecue grills and tables (2 points);

(VIII) Swimming pool (3 points);

(IX) Furnished fitness center equipped with a minimum of two of the following fitness equipment options with at least one option per every 40 Units or partial increment of 40 Units: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, sauna, stair climber, etc. The maximum number of equipment options required for any Development, regardless of number of Units, shall be five (2 points);

(X) Equipped and functioning business center or equipped computer learning center with 1 computer for every 30 Units proposed in the Application, 1 printer for every 3 computers (with minimum of one printer), and 1 fax machine (2 points);

(XI) Furnished Community room (1 point);

(XII) Library with an accessible sitting area (separate from the community room) (1 point);

(XIII) Enclosed sun porch or covered community porch/patio (2 points);

(XIV) Service coordinator office in addition to leasing offices (1 point);

(XV) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(XVI) Health Screening Room (1 point);

(XVII) Secured Entry (elevator buildings only) (1 point);

(XVIII) Horseshoe pit, putting green or shuffleboard court (1 point);

(XIX) Community Dining Room w/full or warming kitchen (3 points);

(XX) One Children's Playscape Equipped for 5 to 12 year olds, or one Tot Lot (1 Point);

(XXI) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(XXII) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(XXIII) Furnished and staffed Children's Activity Center (3 points);

(XXIV) Community Theater Room equipped with a 52 inch or larger screen with surround sound equipment; DVD player; and theater seating (3 points); or

(XXV) Green Building amenities:

(-a-) evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(-b-) passive solar heating/cooling (3 points);

(-c-) water conserving features (toilets using less than or equal to 1.6 gallons per flush, showerheads, kitchen faucets or bathroom faucets using less than or equal to 2.0 gallons per minute) (1 point for each);

(-d-) solar water heaters (2 points);

(-e-) collected water (at least 50%) for irrigation purposes (2 points);

(-f-) sub-metered utility meters (3 points);

(-g-) Energy Star qualified windows and glass doors (2 points);

(-h-) thermally and draft efficient doors (SHGC of 0.40 and U-value specified by climate zone according to the 2006 IECC) (2 points);

(-i-) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points);

(-j-) construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(-k-) exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria (2 points);

(-l-) HVAC, windows, domestic hot water heater or insulation that exceeds Energy Star standards or exceeds the IRC 2006 (2 points);

(-m-) bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (2 points);

(-n-) recycling service provided throughout the compliance period (1 point); or

(-o-) water permeable walkways (1 point).

(B) A certification that the Development will have all of the following Amenities at no charge to the tenants. All New Construction or Reconstruction Units must provide the amenities in clauses (i) - (vii) of this subparagraph. Rehabilitation (excluding Reconstruction) and Adaptive Reuse must provide the amenities in clauses (ii) - (vii) of this subparagraph unless expressly identified as not required. (§2306.187)

(i) All New Construction Units must be wired with RG-6 COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(ii) Blinds or window coverings for all windows;

(iii) Disposal and Energy-Star or equivalently rated dishwasher (not required for TRDO-USDA or SRO Developments);

(iv) Energy-Star or equivalently rated (not required for SRO Developments) Refrigerator;

(v) Exhaust/vent fans (vented to the outside) in bathrooms;

(vi) Energy-Star or equivalently rated ceiling fans in living areas and bedrooms; and

(vii) Energy-Star or equivalently rated lighting fixtures in all Units.

(C) A certification that the Development will meet the minimum threshold for size of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with the selection criteria points in subsection (i) of this section. Developments proposing Rehabilitation (excluding Reconstruction) or Single Room Occupancy will not be subject to the requirements of this subparagraph.

(i) 550 square feet for an efficiency Unit;

(ii) 650 square feet for a non-elderly one Bedroom Unit; 550 square feet for an elderly one Bedroom Unit;

(iii) 900 square feet for a non-elderly two Bedroom Unit; 700 square feet for an elderly two Bedroom Unit;

(iv) 1,000 square feet for a three Bedroom Unit; and

(v) 1,200 square feet for a four Bedroom Unit.

(D) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(E) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(F) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment Notice until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (§2306.6734)

(G) Pursuant to §2306.6722, any Development supported with a Housing Tax Credit allocation shall comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from the Development engineer, an accredited architect or Department-approved third party accessibility specialist, that the Development will comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C and this subparagraph. (§2306.6722 and §2306.6730)

(H) For Developments involving New Construction (excluding New Construction of non-residential buildings) where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist.

(I) A certification that the Development will be equipped with energy saving devices that meet the standard statewide energy code adopted by the state energy conservation office, unless historic preservation codes permit otherwise for a Development involving historic preservation. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit at the time the 10% Test Documentation is submitted and in actual construction upon Cost Certification. (§2306.6725(b)(1))

(J) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 8(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(K) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186 Texas Government Code and as further described in §1.37 of this title.

(L) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a Neighborhood Organization for purposes of subsection (i)(2) of this section, has not given money or a gift to cause the Neighborhood Organization to take its position of support or opposition, nor has provided any assistance to a Neighborhood Organization to meet the requirements under subsection (i)(2) of this section which are not allowed under that subsection, as it relates to the Applicant's Application or any other Application under consideration in 2009.

(M) Operate in accordance with the requirements pertaining to rental assistance in Chapter 60 of this title.

(N) A certification that the Development Owner will contract with a Management Company throughout the Compliance Period that will perform criminal background checks on all adult tenants, head and co head of households.

(5) Design Items. This exhibit will provide:

(A) All of the architectural drawings identified in clauses (i) - (iii) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in clauses (i) - (iii) of this subparagraph. For Developments involving Rehabilitation for which the Unit configurations are not being altered, only the items identified in clauses (i) and (iii) of this subparagraph are required:

(i) A site plan which:

(I) Is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) Is consistent with the number of buildings and building type/unit mix specified in the "Building/Unit Configuration" provided in the Application; and

(III) Identifies all residential and common buildings;

(ii) Floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition. Adaptive Reuse Developments, are only required to provide building plans delineating each unit by number, type and area consistent with those in the "Rent Schedule" and pictures of each elevation of the existing building depicting the height of each floor and percentage estimate of the exterior composition; and

(iii) Unit floor plans for each type of Unit. The net rentable areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" and "Building/Unit Configuration" provided in the Application. Adaptive Reuse Developments, are only required to provide Unit floor plans for each distinct typical Unit type (i.e. one-bedroom, two-bedroom) and for all Units types that vary in area by 10% from the typical Unit; and

(B) A boundary survey of the proposed Development Site and of the property to be purchased. In cases where more property is purchased than the proposed Development Site, the survey or plat must show the survey calls for both the larger site and the Development Site. The survey must clearly delineate the flood plain boundary lines and show all easements. The survey does not have to be recent; but it must show the property purchased and the property proposed for the Development Site. In cases where the Development Site is only a part of the site being purchased, the depiction or drawing of the Development Site may be professionally compiled and drawn by an architect, engineer or surveyor.

(6) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) - (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application. (§2306.6705(1))

(B) All Developments must submit the "Development Cost Schedule" provided in the Application. This exhibit must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of Housing Tax Credits requested for allocation to the Development Owner, including pay-in schedules, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis. (§2306.6705(2) and (3))

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD or otherwise qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C) or §49.6(h)(3) and (4) of this chapter, if permitted under §49.6(h) of this chapter, Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments (including reconstruction and Adaptive Reuse) must submit a Property Condition Assessment meeting the requirements of paragraph (14)(C) of this subsection.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $9,000 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(7) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) - (D) of this paragraph:

(A) Evidence of Property control in the name of the Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the 36 months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at Pre-Application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided, and if the acquisition can be characterized as an identity of interest transaction as described in §1.32 of this title, items described in clause (iv) of this subparagraph must also be provided:

(i) A recorded warranty deed with corresponding executed settlement statement, unless required to submit items under clause (iv) of this subparagraph; or

(ii) A contract for lease (the minimum term of the lease must be at least 45 years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) A contract for sale, an exclusive option to purchase or a lease which is valid for the entire period the Development is under consideration for tax credits. For Tax Exempt Bond Development Applications, site control must be valid through December 1, 2008 with option to extend through March 1, 2009 (Applications submitted for lottery) or 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting at which the award of Housing Tax Credits will be considered. The potential expiration of site control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting.

(iv) If the acquisition can be characterized as an identity of interest transaction, as described in §1.32 of this title, subclauses (I), (II) and (III) of this clause, the Applicant must provide (not required at Pre-Application):

(I) Documentation of the original acquisition cost in the form of a settlement statement or, if a settlement statement is not available, the seller's most recent audited financial statement specifically indicating the asset value for the Development Site; and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the Application;

(-a-) An appraisal meeting the requirements of paragraph (14)(D) of this subsection; and

(-b-) Any other verifiable costs of owning, holding, or improving the Property that, when added to the value from subclause (I) of this clause, justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the property, the cost of rezoning, replatting or developing the property, or any costs to provide or improve access to the property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the property and avoid foreclosure.

(III) In no instance will the acquisition cost utilized by the underwriter exceed the lesser of the original acquisition cost evidenced by subclause (I) of this clause plus costs identified in subclause (II)(-b-) of this clause, or the "as-is" value conclusion evidenced by subclause (II)(-a-) of this clause.

(v) As described in clauses (ii) and (iii) of this subparagraph, property control must be continuous. Closing on the property is acceptable, as long as evidence is provided that there was no period in which control was not retained.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period. (§2306.6705(5))

(i) For New Construction or reconstruction Developments, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that (For Tax-Exempt Bond Applications the items in subclauses (I) - (III) of this clause must be submitted no later than 14 days prior to the Board meeting when the housing tax credits will be considered):

(I) The Development is located within the boundaries of a political subdivision which does not have a zoning ordinance; and either subclauses (II) or (III) of this clause;

(II) The letter must state that the Development is consistent with a local consolidated plan, comprehensive plan, or other local planning document that addresses affordable housing; or

(III) The letter must state that there is a need for affordable housing, if no such planning document exists.

(ii) For New Construction or reconstruction Developments, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) The Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(II) The Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied (§2306.6705(1)(B)). The Applicant must also provide at the time of Application a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee, or Determination Notice Fee, is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded. No extensions may be requested for the deadline for submitting evidence of final approval of appropriate zoning.

(iii) For Rehabilitation Developments, if the property is currently a non-conforming use as presently zoned, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction which addresses the items in subclauses (I) - (IV) of this clause:

(I) A detailed narrative of the nature of non-conformance;

(II) The applicable destruction threshold;

(III) Owner's rights to reconstruct in the event of damage; and

(IV) Penalties for noncompliance.

(C) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Any local, state or federal financing identified in this section which restricts household incomes at any AMGI lower than restrictions required pursuant to the Rules must be identified in the Rent Schedule and the local, state or federal income restrictions must include corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g) of the Code. The income and corresponding rent restrictions will be imposed by the Housing Tax Credit LURA and monitored throughout the extended use period. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

(i) Bona fide financing in place as evidenced by:

(I) A valid and binding loan agreement;

(II) Deed(s) of trust in the name of the Development Owner expressly allowing transfer to the Development Owner; and

(III) For TRDO-USDA §515 Developments involving, an executed TRDO-USDA letter indicating TRDO-USDA has received a Consent Request, also referred to as a Preliminary Submittal, as described in 7 CFR §3560.406 and a copy of the original loan documents; or

(ii) Bona fide commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and which

has been executed by the lender (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). The commitment must state an expiration date and all the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate and any required Guarantors. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or

(iii) Any Federal, State or local gap financing, whether of soft or hard debt, must be identified at the time of Application as evidenced by:

(I) Evidence from the lending agency that an application for funding has been made or from the Applicant indicating an intent to apply for funding; and

(II) A term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted; and

(III) Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an Application has been filed as required by the Application Submission Procedures Manual; and

(IV) If the commitment from any funding source identified in this subparagraph has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the funding source, the Commitment Notice may be rescinded; or

(iv) If the Development will be financed through more than 5% of Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(D) Provide the documents in clauses (i) - (iii) of this subparagraph:

(i) A copy of the full legal description for the Development Site; and

(ii) A current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the Development Site, and

(iii) A copy of:

(I) The current title policy which shows that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner; or

(II) a current title commitment with the proposed insured matching exactly the name of the Development Owner and the title of the Development Site vested in the exact name of the seller or lessor as indicated on the sales contract, option or lease.

(III) If the title policy or commitment is more than six months old as of the day the Application Acceptance Period closes, then a letter from the title company indicating that nothing further has transpired on the policy or commitment.

(8) Evidence in the form of a certification of all of the notifications described in the subparagraphs of this paragraph. Such notices must be prepared in accordance with the "Public Notifications" certification provided in the Application.

(A) Evidence in the form of a certification that the Applicant met the requirements and deadlines identified in clauses (i) - (iii) of this subparagraph. Notification must not be older than three months from the first day of the Application Acceptance Period. (§2306.6705(9)). If evidence of these notifications was submitted with the Pre-Application Threshold for the same Application and satisfied the Department's review of Pre-Application Threshold, then no additional notification is required at Application, except that re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from Pre-Application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of greater than 10%, a total increase of greater than 10% for any given level of AMGI, or a change to the population being served (elderly, Intergenerational Housing or family). For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notifications and proof thereof must not be older than three months prior to the date the Volume III of the Application is submitted.

(i) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site from local elected officials as follows:

(I) No later than January 20, 2009 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Applications, Rural Rescue, or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., not later than 14 days prior to submission of the Threshold documentation), the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format.

(II) If no reply letter is received from the local elected officials by February 20, 2009, (or For Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., by 7 days prior to the submission of the Application), then the Applicant must certify to that fact in the "Application Notification Certification Form" provided in the Application.

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of as of the submission of the Application, in the "Application Notification Certification Form" provided in the Application.

(ii) Not later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials. Evidence of Notification is required in the form of a certification in the "Application Notification Certification Form" provided in the Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entites prescribed subclauses (I) - (IX) of this clause, in the event that the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in clause (i)(III) of this subparagraph.

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of the Governing Body of any municipality containing the Development;

(V) All elected members of the Governing Body of any municipality containing the Development;

(VI) Presiding officer of the Governing Body of the county containing the Development;

(VII) All elected members of the Governing Body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction, reconstruction, Adaptive Reuse or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Application, which are subject to change as annual changes in the area median income occur; and

(IX) The expected completion date if credits are awarded.

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development Site prior to the date the Application is submitted unless prohibited by local ordinance or code. Scattered site Developments must install a sign on each Development Site. For Competitive Housing Tax Credit Applications the date, time and location of the public hearing, as published by the Department and closest to the Development Site, must be included on the sign. For Tax-Exempt Bond Developments, regardless of the Priority of the Application or the Issuer, the sign must be installed within thirty (30) days of the Department's receipt of Volumes I and II. The date, time and location of the bond Tax Exempt Fiscal Responsibility Act (TEFRA) public hearing must be included on the sign no later than thirty (30) days prior to the scheduled public hearing. Evidence submitted with the Application must include photographs of the site with the installed sign. The sign must be at least 4 feet by 8 feet in size and located within twenty feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the Development. The information and lettering on the sign must meet the minimum requirements identified in the Application. For Tax-Exempt Bond Developments, regardless of the issuer, the Applicant must certify to the fact that the sign was installed within 30 days of submission and the date, time and location of the TEFRA hearing is indicated on the sign at least 30 days prior to the date of the scheduled hearing. In areas where the Public Notification Sign is prohibited by local ordinance or code, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development Site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If Public Notification Sign is prohibited by local ordinance or code, evidence of the applicable ordinance or code must be submitted in the Application.

(i) All addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) For Developments located in communities that do not have zoning, communities that do not require a zoning notification or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development Site.

(C) If any of the Units in the Development are occupied at the time of Application, then the Applicant must certify that it has notified each tenant at the Development of all the information other-

wise required on the sign, including the Department's public hearing schedule for comment on submitted Applications.

(9) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) - (D) of this paragraph.

(A) Chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must be included in this exhibit.

(B) Each Applicant, Development Owner, Developer or Guarantor, or any entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, shall provide the following documentation, as applicable:

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas, a certificate of reservation of the entity name from the Texas Secretary of State; or

(ii) For existing entities whether formed in or outside of the state of Texas, evidence that the entity has the authority to do business in Texas or has applied for such authority.

(C) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved; documentation for individual board members and executive directors is required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2009 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(D) Evidence, in the form of a certification, that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under subsection (g)(1) of this section. Applicants must request this certification at least fourteen days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(10) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) - (D) of this paragraph:

(A) All Developments must provide a 30-year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties).

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement. (§2306.6705(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate.

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (iv) of this subparagraph.

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to the Applicant's inability to provide all documentation as described.

(I) Submit at least one of the following:

(-a-) Historical monthly operating statements of the subject Development for 12 consecutive months ending not more than 3 months from the first day of the Application Acceptance Period;

(-b-) The two most recent consecutive annual operating statement summaries;

(-c-) The most recent consecutive six months of operating statements and the most recent available annual operating summary;

(-d-) All monthly or annual operating summaries available and a written statement from the seller refusing to supply any other summaries or expressing the inability to supply any other summaries, and any other supporting documentation used to generate projections may be provided; and

(II) A rent roll not more than 6 months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(ii) A written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iii) For Intergenerational Housing Applications or Qualified Elderly Developments, identification of the number of existing tenants qualified under the target population elected under this title;

(iv) A relocation plan outlining relocation requirements and a budget with an identified funding source; and (§2306.6705(6))

(v) If applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(11) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applications involving a nonprofit General Partner, regardless of the Set-Aside applied under, in which the Development will receive some financial or tax benefit for the involvement of the nonprofit General Partner, must submit all of the documents described in clauses (i) and (ii) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609: (§2306.6706)

(i) An IRS determination letter which states that the nonprofit organization is a §501(c)(3) or (4) entity or; and

(ii) The "Nonprofit Participation Exhibit."

(B) Additionally, all Applications applying under the Nonprofit Set-Aside, established under §49.7(b)(1) of this chapter, must also provide the following information with respect to the Qualified Nonprofit Organization as described in clauses (i) - (iii) of this subparagraph.

(i) A Third Party legal opinion stating:

(I) That the nonprofit organization is not affiliated with or Controlled by a forprofit organization and the basis for that opinion; and

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member; and otherwise meet the requirements of the Code, §42(h)(5); and

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing; and

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board; and

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(ii) A copy of the nonprofit organization's most recent audited financial statement; and

(iii) Evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) In this state, if the Development is located in a Rural Area; or

(II) Not more than 90 miles from the Development, if the Development is not located in a Rural Area.

(12) Applicants applying for acquisition credits must provide:

(A) An appraisal meeting the requirements of paragraph (14)(D) of this subsection; and

(B) An "Acquisition of Existing Buildings Form."

(13) Evidence of Financial Statement and Authorization to Release Credit Information. The financial statements and authorization to release credit information must be unbound and clearly labeled. A "Financial Statement and Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has an ownership interest of 10% or more in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit.

(A) Financial statements for an individual must not be older than 90 days from the first day of the Application Acceptance Period.

(B) Financial statements for partnerships or corporations should be for the most recent fiscal year ended 90 days from the first day of the Application Acceptance Period. An audited financial statement should be provided, if available, and all partnership or corporate financials must be certified. Financial statements are required for an entity even if the entity is wholly-owned by a Person who has submitted this document as an individual.

(C) Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities, or net worth are not required to submit this documentation, but must submit a statement with their Application that this is the case.

(14) Supplemental Threshold Reports. All Applications must include documents under subparagraphs (A) and (B) of this paragraph. If required under paragraph (6) of this subsection, a Property Condition Assessment as described in subparagraph (C) of this paragraph must be submitted. If required under paragraphs (7) or (12) of this subsection, an appraisal as described in subparagraph (D) of this paragraph must be submitted. All submissions must meet the requirements stated in subparagraphs (E) - (G) of this paragraph.

(A) A Phase I Environmental Site Assessment (ESA) report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than 12 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated not more than three months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report;

(iii) Prepared in accordance with the Department's Environmental Site Assessment Rules and Guidelines, §1.35 of this title; and

(iv) Developments whose funds have been obligated by TRDO-USDA will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Analysis report:

(i) Prepared by a Third Party Qualified Market Analyst approved by the Department in accordance with the approval process outlined in the Market Analysis Rules and Guidelines, §1.33 of this title;

(ii) Dated not more than 6 months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than 6 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however the Department will not accept any Market Analysis which is more than 12 months old as of the first day of the Application Acceptance Period; and

(iii) Prepared in accordance with the methodology prescribed in the Department's Market Analysis Rules and Guidelines, §1.33 of this title.

(iv) For Applications in the TRDO-USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80% occupancy at the time of Application Submission, the appraisal, required under paragraphs (7) or (12) of this subsection and prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title, will satisfy the requirement for a Market Analysis; however the Department may request additional information as needed. (§2306.67055) (§42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) report (required for Rehabilitation, reconstruction and Adaptive Reuse Developments:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than 6 months prior to the first day of the Application Acceptance Period; and

(iii) Prepared in accordance with the Department's Property Condition and Assessment Rules and Guidelines, §1.36 of this title.

(iv) For Developments which require a capital needs assessment from TRDO-USDA, the capital needs assessment may be substituted and may be more than 6 months old, as long as TRDO-USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §1.36 of this title.

(D) An appraisal report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than 6 months prior to the first day of the Application Acceptance Period. In the event that an appraisal is more than 6 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated appraisal from the Person or organization which prepared the initial report; however the Department will not accept any appraisal which is more than 12 months old as of the first day of the Application Acceptance Period; and

(iii) Prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title.

(iv) For Developments that require an appraisal from TRDO-USDA, the appraisal may be more than 6 months old, as long as TRDO-USDA has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report. The transmittal letter must also state the report preparer has read and understood the Department rules specific to the report found at §§1.33 - 1.36 of this title.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances of non-response by the report provider, the Department may substitute in-house analysis.

(G) The requirements for each of the reports identified in subparagraphs (A) - (C) of this paragraph can be satisfied in either of the methods identified in clause (i) or (ii) of this subparagraph and meet the requirements of clause (iii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than April 1, 2009. In addition to the submission of the engagement letter with the Application, a map must be provided that reflects the Qualified Market Analyst's intended market area. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CST, April 1, 2009. If the entire exhibit is not received by that time, the Application will be terminated and will be removed from consideration.

(iii) A single hard copy of the report and a searchable soft copy in the format of a single file containing all information and exhibits in the hard copy report, presented in the order they appear in the hard copy report on a CD-R clearly labeled with the report type, Development name, and Development location are required.

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form." An Applicant may not adjust the Application Self Scoring Form without a request from the Department as a result of an Administrative Deficiency.

(i) Selection Criteria. All Applications will be scored and ranked using the point system identified in this subsection. Unless otherwise stated, do not round calculations. Points other than paragraphs (2) and (6) of this subsection will not be awarded unless requested in the Self Scoring Form. All Applications, with the exception of TRDO-USDA Applications, must receive a final score totaling a minimum of 118, not including any points awarded or deducted pursuant to paragraphs (2) and (6) of this subsection to be eligible for an allocation of Housing Tax Credits. Maximum Total Points: 240.

(1) Financial Feasibility of the Development. Financial Feasibility of the Development based on the supporting financial data required in the Application that will include a Development underwriting pro forma from the permanent or construction lender. (§2306.6710(b)(1)(A)). Applications may qualify to receive 28 points for this item. No partial points will be awarded. Evidence will include the documentation required for this exhibit, as reflected in the Application submitted, in addition to the commitment letter required under subsection (h)(7)(C) of this section. The supporting financial data shall include:

(A) A fifteen year pro forma prepared by the permanent or construction lender:

(i) Specifically identifying each of the first five years and every fifth year thereafter;

(ii) Specifically identifying underlying assumptions including, but not limited to general growth factor applied to income and expense; and

(iii) Indicating that the Development maintains a minimum 1.15 debt coverage ratio throughout the initial fifteen years proposed for all third party lenders that require scheduled repayment; and

(B) A statement in the commitment letter, or other form deemed acceptable by the Department, indicating that the lender's assessment finds that the Development will be feasible for fifteen years.

(C) For Developments receiving financing from TRDO-USDA, the form entitled "Sources and Uses Comprehensive Evaluation for Multi-Family Housing Loans" or other form deemed acceptable by the Department shall meet the requirements of this section.

(2) Quantifiable Community Participation from Neighborhood Organizations on Record with the State or County and Whose Boundaries Contain the Proposed Development Site. Points will be awarded based on written statements of support or opposition from Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site. (§2306.6710(b)(1)(B); §2306.6725(a)(2)). It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under subsection (h)(8)(A)(ii) of this section if the organization provides the information and documentation required in subparagraphs (A) - (C) of this paragraph. It is also possible that neighborhood organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring. If an organization is determined not to be qualified under this paragraph, the organization may qualify under paragraph (18)(B) of this subsection.

(A) Basic Submission Requirements for Scoring. Each Neighborhood Organization may submit one letter (and enclosures) that represents the organization's input. In order to receive a point score, the letter (and enclosures) must be received, by the Department, or postmarked, if mailed by the U.S Postal Service,no later than February 27, 2009, for letters relating to Applications that submitted a Pre-Application, or April 1, 2009 if a Pre-Application was not submitted. Letters should be addressed to the Texas Department of Housing and Community Affairs, "Attention: Director of Multifamily Finance (Neighborhood Input)." Letters received after the applicable deadline will be summarized for the Board's information and consideration, but will not affect the score for the Application. The organization's letter (and enclosures) must:

(i) State the name and location of the proposed single Development;

(ii) Certify that the letter is signed by the persons with the authority to sign on behalf of the neighborhood organization, and provide:

(I) the street and/or mailing addresses;

(II) day and evening phone numbers;

(III) and e-mail addresses and/or facsimile numbers for the signer of the letter and one additional contact for the organization;

(iii) Certify that the organization has boundaries, and that the boundaries in effect February 27, 2009 contain the proposed Development Site;

(iv) Certify that the organization meets the definition of "Neighborhood Organization as defined in §49.3(63) of this chapter." For the purposes of this section, a "Neighborhood Organization" is defined as an organization of persons living near one another within the organization's defined boundaries in effect February 27, 2009 that contain the proposed Development site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. "Neighborhood Organizations" include homeowners associations, property owners associations, and resident councils in which the council is commenting on the Rehabilitation or reconstruction of the property occupied by the residents. "Neighborhood Organizations" do not include broader based "community" organizations;

(v) Include documentation showing that the organization is on record as of February 27, 2009 with the state or county in which the Development is proposed to be located. The receipt of a QCP letter, by the Department on or before February 27, 2009, that meets the requirements outlined in the QCP neighborhood information packet and the 2009 QAP, will constitute being on record with the State. The Neighborhood Organization must be signed by two officials or board members of the Neighborhood Organization and must include in its letter, a contact name with a mailing address and phone number of persons signing the letter; a written description and map of the organization's geographical boundaries; and proof that the boundaries described were in effect as of February 27, 2009. This request must be received no later than February 27, 2009. Acceptance of this documentation will be subject to Department approval. The Department is permitted to issue a deficiency notice for this registration process and if satisfied, the organization will still be deemed to be timely placed on record with the state;

(vi) Accurately certify that the Neighborhood Organization was not formed by any Applicant, Developer, or any employee or agent of any Applicant (the seller of land is not considered, with the exception of an identity of interest, to be an agent of the Application) in the 2009 Competitive Housing Tax Credit Application Round, that the organization and any member did not accept money or a gift to cause the Neighborhood Organization to take its position of support or opposition, and has not provided any assistance other than education and information sharing to the Neighborhood Organization to meet the requirements of this subparagraph for any Application in the Application Round (i.e. hosting a public meeting, providing the "TDHCA Information Packet for Neighborhoods" to the Neighborhood Organization, or referring the Neighborhood Organization to TDHCA staff for guidance). Applicants may not provide any "production" assistance to meet these requirements for any Application in the Application Round (i.e. use of fax machines owned by the Applicant, use of legal counsel related to the Applicant, or assistance drafting a letter for the purposes of this subparagraph). Applicants may not provide delivery assistance of any communication between the Neighborhood Organization and the Department. Applicants may provide information about the process or deadlines to a Neighborhood Organization;

(vii) While not required, the organization is encouraged to hold a meeting to which all the members of the organization are invited to consider whether the organization should support, oppose, or be neutral on the proposed Development, and to have the membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to invite the Developer or Applicant to this meeting; and

(viii) Letters from Neighborhood Organizations, and subsequent correspondence from Neighborhood Organizations, may not be provided via the Applicant which includes facsimile and email communication.

(B) Scoring of Letters (and Enclosures). The input must clearly and concisely state each reason for the Neighborhood Organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will range from a maximum of +24 for the position support to +12 for the neutral position to 0 for a position of opposition. The number of

points to be allocated to each organization's letter will be based on the organization's letter and evidence enclosed with the letter. The final score will be determined by the Executive Director. The Department may investigate a matter and contact the Applicant and Neighborhood Organizations for more information. The Department may consider any relevant information specified in letters from other Neighborhood Organizations regarding a Development in determining a score.

(ii) The Department highly values quality public input addressed to the merits of a Development. Input that points out matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the Neighborhood Organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered.

(iii) In general, letters that meet the requirements of this paragraph and:

(I) Establish at least one reason for support or opposition will be scored the maximum points for either support (+24 points) or opposition (zero); or

(II) That do not establish a reason for support or opposition or that are unclear will be considered ineligible and scored as neutral (+12 points).

(iv) If an Application receives multiple eligible letters, the average score of all eligible letters will be applied to the Application.

(v) Applications for which no letters from Neighborhood Organizations are scored will receive a neutral score of +12 points.

(C) Basic Submission Deficiencies. The Department is authorized but not required to request that the Neighborhood Organization provide additional information or documentation the Department deems relevant to clarify information contained in the organization's letter (and enclosures). If the Department determines to request additional information from an organization, it will do so by e-mail or facsimile to the e-mail address or facsimile number provided with the organization's letter. If the deficiencies are not clarified or corrected in the Department's determination within five business days from the date the e-mail or facsimile is sent to the organization, the organization's letter will not be considered further for scoring and the organization will be so advised. This potential deficiency process does not extend any deadline required above for the "Quantifiable Community Participation" process. An organization may not submit additional information or documentation after the applicable deadlines except in response to an e-mail or facsimile from the Department specifically requesting additional information.

(3) The Income Levels of Tenants of the Development. Applications may qualify to receive up to 22 points for qualifying under only one of subparagraphs (A) - (F) of this paragraph. To qualify for these points, the household incomes must not be higher than permitted by the AMGI level (must round to the next highest whole Unit, no less than one Unit). To qualify for these points at least 10% of all the Units that are not Low-Income Units (i.e. market rate units) in the Development must be set-aside with incomes at or below 80% of AMGI. The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code. (§§2306.111(g)(3)(B); 2306.111(g)(3)(E); 2306.6710(b)(1)(C); 2306.6710(e); and §42(m)(1)(B)(ii)(I))

(A) 22 points if at least 80% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(B) 22 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Low-Income Units are at or below 30% of AMGI; or

(C) 20 points if at least 60% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(D) 18 points if at least 10% of the Low-Income Units in the Development are set-aside with incomes at or below 30% of AMGI; or

(E) 16 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(F) 14 points if at least 35% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI.

(4) The Size and Quality of the Units (Development Characteristics). Applications may qualify to receive up to 20 points. Applications may qualify for points under both subparagraphs (A) and (B) of this paragraph. (§2306.6710(b)(1)(D) and §42(m)(1)(C)(iii))

(A) Size of the Units. Applications may qualify to receive 6 points. The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), Developments receiving funding from TRDO-USDA, or Developments proposing Single Room Occupancy without meeting these square footage minimums if requested in the Self Scoring Form. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted in clauses (i) - (v) of this subparagraph. Changes to an Application during any phase of the review process that decreases the square footage below the minimums noted in clauses (i) - (v) of this subparagraph, will be re-evaluated and may result in a reduction of the Application score.

(i) 600 square feet for an efficiency Unit;

(ii) 700 square feet for a non-elderly one Bedroom Unit; 600 square feet for an elderly one Bedroom Unit;

(iii) 950 square feet for a non-elderly two Bedroom Unit; 750 square feet for an elderly two Bedroom Unit;

(iv) 1,050 square feet for a three Bedroom Unit; and

(v) 1,250 square feet for a four Bedroom Unit.

(B) Quality of the Units. Applications may qualify to receive 14 points. Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to

the tenant will be awarded points based on the point structure provided in clauses (i) - (xix) of this subparagraph, not to exceed 14 points in total. Applications involving scattered site Developments must have all of the Units located with a specific amenity to count for points. Applications involving Rehabilitation (excluding reconstruction) or single room occupancy may receive 1.5 points for each point item, not to exceed 14 points in total (do not round).

(i) Covered entries (1 point);

(ii) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Ceiling fixtures in all rooms (light with ceiling fan in living area and all bedrooms) (1 point);

(vi) Refrigerator with icemaker (1 point);

(vii) Laundry connections (2 points);

(viii) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets - does not need to be in the Unit but must be on the property site (1 point);

(ix) Laundry equipment (washers and dryers) for each individual unit including a front loading washer and dryer in required UFAS compliant Units (3 points);

(x) Thirty year architectural shingle roofing (1 point);

(xi) Covered patios or covered balconies (1 point);

(xii) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xiii) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (3 points) (Applicants may not select this item if item (xiv) of this subclause is selected);

(xiv) Greater than 75% masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (1 point) (Applicants may not select this item if item (xiii) of this subclause is selected);

(xv) Use of energy efficient alternative construction materials (for example, Structural Insulated Panel construction) with wall insulation at a minimum of R-20 (3 points);

(xvi) R-15 Walls / R-30 Ceilings (rating of wall system) (3 points);

(xvii) 14 SEER HVAC or evaporative coolers in dry climates for New Construction, Adaptive Reuse, and reconstruction or radiant barrier in the attic for Rehabilitation (excluding reconstruction) (3 points);

(xviii) High Speed Internet service to all Units at no cost to residents (2 points); or

(xix) Fire sprinklers in all Units (2 points).

(5) The Commitment of Development Funding by Local Political Subdivisions. Applications may qualify to receive up to 18 points for qualifying under this paragraph provided for under Development Funding. (§2306.6710(b)(1)(E))

(A) Basic Submission Requirements for Scoring. Evidence of the following must be submitted in accordance with the Application Submission Procedures Manual (ASPM).

(i) The loans, grant(s) or in-kind contribution(s) must be attributed to the Total Housing Development Costs, as defined in this chapter, unless otherwise stipulated in this section.

(ii) An Applicant may submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, if an Applicant is requesting 18 points, five sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost.

(iii) An Applicant may substitute any source in response to a Deficiency Notice or after the Application has been submitted to the Department.

(iv) A loan does not qualify as an eligible source unless it has a minimum term of the later of 1-year or the Placed in Service date, and the interest rate must be at the Applicable Federal Rate (AFR) or below (at the time of loan closing).

(v) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible for points if the in-kind contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development will be acceptable to qualify for these points. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed. Donations of land must be under the control of the Applicant, pursuant to subsection (h)(7) of this section to qualify. The value of in-kind contributions may only include the time period between award, or August 1, 2009 and the Development's Placed in Service date, with the exception of contributions of land. The full value of land contributions, as established by the appraisal required pursuant to clause (viii) of this subparagraph. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute.

(vi) To the extent that a Notice of Funding Availability (NOFA) is released and funds are available, funds from TDHCA's HOME Investment Partnerships (HOME) Program will qualify if a resolution, dated on or before the date the Application Acceptance Period ends, is submitted with the Application from the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular Application. TDHCA's HOME funds may be substituted for a source originally submitted with the Application, provided the HOME funds substituted are from a NOFA released after the Application Acceptance Period ends and a resolution is submitted with the substitution documentation from the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular Application.

(vii) Development based rental subsidies may qualify under this section if evidence of the remaining value of the contract is submitted from the Local Political Subdivision. The value of the contract does not include past subsidies.

(viii) Evidence to be submitted with the Application must include a copy of the commitment of funds; a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received; or a certification of intent to apply for funding that indicates the funding entity and program to which the application will be submitted, the loan amount to be applied for and the specific proposed terms. For in-kind contributions, evidence must be

submitted in the Application from Local Political Subdivision substantiating the value of the in-kind contributions. For in-kind contributions of land, evidence of the value of the contribution must be in the form of an appraisal.

(ix) If not already provided, at the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the Governing Body of the Local Political Subdivision for the Development Funding to the Department. If the funding commitment from the Local Political Subdivision has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the Local Political Subdivision's Development Funding, the Commitment Notice will be rescinded and the credits reallocated.

(x) Funding commitments from a Local Political Subdivision will not be considered final unless the Local Political Subdivision attests to the fact that any funds committed were not first provided to the Local Political Subdivision by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision or subsidiary.

(B) Scoring. Points will be determined on a sliding scale based on the percentage of the Total Housing Development Costs of the Development, as reflected in the in the Development Cost Schedule. If a revised Development Cost Schedule is submitted to the Department in response to a deficiency notice at anytime during the review process, the Revised Development Cost Schedule will be utilized for this calculation, and Applicants will be notified of the revised score, consistent with subsection (e) of this section. Do not round for the following calculations. The "total contribution" is the total combined value of qualifying loan(s), grants or in-kind contributions from a Local Political Subdivision pursuant to subparagraph (A) of this paragraph. The required percentages for Rural Developments listed in clauses (i) - (iii) of this subparagraph only apply to Rural Developments applying for local funds.

(i) A total contribution equal to or greater than 1% (for Urban Developments) and 0.5% (for Rural Developments) of the Total Housing Development Cost of the Development receives 6 points; or

(ii) A total contribution equal to or greater than 2.5% (for Urban Developments) and 1.5% (for Rural Developments) of the Total Housing Development Cost of the Development receives 12 points; or

(iii) A total contribution equal to or greater than 5% (for Urban Developments) and 3% (for Rural Developments) of the Total Housing Development Cost of the Development receives 18 points.

(6) The Level of Community Support from State Representative or State Senator. The level of community support for the Application, evaluated on the basis of written statements received from the State Representative or State Senator that represents the district containing the proposed Development Site. (§2306.6710(b)(1)(F) and §2306.6725(a)(2)). Applications may qualify to receive 14 points for this item. Letters must identify the specific Development and must clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator on or before 5:00 p.m. (CST) April 1, 2009. A State Representative or State Senator may withdraw (in writing) a letter that is submitted by the April 1st deadline on or before June 15, 2009. The previous position of support or opposition will be scored as neutral. State Representatives or Senators to be considered are those State Representatives or Senators in office at the time the Application is submitted. Letters of support from State Representatives or Senators that do not represent the district containing the proposed Development Site will not qualify for points under this Exhibit. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points. Letters from State of Texas Representative or Senator: support letters are +14 points; opposition letters are -14 points for a maximum of either 14 or -14 points. If one letter is received in support and one letter is received in opposition the score would be 0 points.

(7) The Rent Levels of the Units. Applications may qualify to receive up to 12 points for qualifying under this exhibit. (§2306.6710(b)(1)(G)). Provided the Application has qualified for points under paragraph (3) of this subsection, Income Levels of Tenants of the Development, an Application may qualify for points under this subsection by providing additional Low-Income Units at 50% of AMGI (must round up to the next whole Unit, not less than one Unit), as follows:

(A) An Application may receive 12 points if the Development provides an additional 10% of all Low-Income Units in excess of those committed in paragraph (3) of this subsection at rents and incomes at or below 50% of AMGI; or

(B) An Application may receive 6 points if the Development provides an additional 5% of all Low-Income Units in excess of those committed in paragraph (3) of this subsection at rents and incomes at or below 50% of AMGI.

(8) The Cost of the Development by Square Foot (Development Characteristics). Applications may qualify to receive 10 points for this item. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)). For this exhibit, costs shall be defined as construction costs, including site work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of net rentable area (NRA). For the purposes of this paragraph only, if the proposed Development is an elevator building serving elderly or a high rise building serving any population, the NRA may include elevator served interior corridors. If the proposed Development is a Single Room Occupancy Development, the NRA may include elevator served interior corridors and may include up to 50 square feet of common area per efficiency Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for 10 points if their costs do not exceed $95 per square foot for Qualified Elderly, single family design, transitional, and Single Room Occupancy Developments (transitional housing for the homeless and Single Room Occupancy units as provided in the Code, §42(i)(3)(B)(iii) and (iv)), unless located in a "First Tier County" in which case their costs do not exceed $97 per square foot; and $85 for all other Developments, unless designated as "First Tier" by the Texas Department of Insurance, in which case their costs do not exceed $87 per square foot. For 2008, the First Tier counties are Aransas, Brazoria, Calhoun, Chambers, Galveston, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, San Patricio, and Willacy. There are also specifically designated First Tier

communities in Harris County that are east of State Highway 146, and evidence in the Application must include a map with the Development site designated clearly within the community. These communities are Pasadena, Morgan's Point, Shoreacres, Seabrook and La Porte. Intergenerational Developments will receive 10 points if costs described above do not exceed the square footage limit for elderly and non-elderly units as determined by using the NRA attributable to the respective elderly and non-elderly units. The Department will determine if points will be awarded by multiplying the NRA for elderly units by the applicable square footage limit for the elderly units and adding that total to the result of the multiplication of the NRA for family units by the applicable non-elderly square footage limit. If this maximum cost amount is equal to, or greater than the total of the costs identified above for the Application, points will be awarded (10 points).

(9) The Services to be Provided to Tenants of the Development. Applications may qualify to receive up to 8 points. (§2306.6710(b)(1)(I) and §2306.6725(a)(1))

(A) The Applicant must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this paragraph. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided (maximum of 7 points).

(i) Applications will be awarded points for selecting services listed in clause (ii) of this subparagraph based on the following scoring range:

(I) Two points will be awarded for providing two of the services; or

(II) Four points will be awarded for providing four of the services; or

(III) Seven points will be awarded for providing six of the services.

(ii) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; organized team sports programs or youth programs; scholastic tutoring; any other programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or any other services approved in writing by the Department.

(B) In addition, Applications will receive 1 point for providing Notary Public Services to tenants at no cost to the tenant. This will be included in the LURA.

(10) Declared Disaster Areas (§2306.6710(b)(1)). Applications may receive 7 points, if at time the complete Application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in a Disaster Area as defined in §49.3 of this chapter.

(11) Rehabilitation, (which includes reconstruction) or Adaptive Reuse. Applications may qualify to receive 6 points. Applications proposing to build solely Rehabilitation (excluding New Construction of non-residential buildings), solely reconstruction (excluding New Construction of non-residential buildings), or solely Adaptive Reuse qualify for points.

(12) Housing Needs Characteristics. (§42(m)(1)(C)(ii)). Applications may qualify to receive up to 6 points. Each Application may receive a score if correctly requested in the self score form based on objective measures of housing need in the Area where the Development is located. This Affordable Housing Need Score for each Area will be published in a Site Demographic Characteristics table in the Reference Manual.

(13) Community Revitalization (Development Characteristics) (§42(m)(1)(C)(iii)) or Historic Preservation. Applications may qualify to receive 6 points for either subparagraph (A) or (B) of this paragraph.

(A) The Development includes the use of Existing Residential Housing and proposes any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan and a letter from the chief executive officer or other local official with appropriate jurisdiction of local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted; or

(B) The Development includes the use of an existing building that is designated as historic by a federal or state Entity and proposes Rehabilitation (including reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence will include proof of the historic designation from the appropriate Governmental Body.

(14) Pre-Application Participation Incentive Points. (§2306.6704) Applications that submitted a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive 6 points for this item. To be eligible for these points, the Application must:

(A) Be for the identical Development Site, or reduced portion of the Development Site as the proposed Development Site under control in the Pre-Application;

(B) Have met the Pre-Application Threshold Criteria;

(C) Be serving the same target population (family, Intergenerational Housing, or elderly) as in the Pre-Application;

(D) Be serving the same target Set-Asides as indicated in the Pre-Application (Set-Asides can be dropped between Pre-Application and Application, but no Set-Asides can be added); and

(E) Be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at Pre-Application, with the exclusion of points for support and opposition under paragraphs (2), (6), and (18) of this of this subsection. The Application score used to determine whether the Application score is 5% greater or less than the number of points awarded at Pre-Application will also include all point losses under subsection (d)(4) of this section. An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) To request the Pre-Application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the 5% range from Pre-Application to Application; or

(ii) To request that the Pre-Application points be forfeited and that the Department evaluate the Application as requested in the self-scoring sheet.

(15) Economic Development Initiatives. A Development that is located in one of the following two areas may qualify to receive 4 points. For the purpose of this paragraph, "area" shall mean the boundaries of any zone or community in subparagraph (A) of this paragraph or the area in which funds in subparagraph (B) of this paragraph must be used:

(A) a Designated State or Federal Empowerment/Enterprise Zone, Urban Enterprise Community, or Urban Enhanced Enterprise Community. To be eligible for these points, Applicants must submit a letter and a map of the zoned area from a city/county official stating that the proposed Development is located within such a designated zone or area; is eligible to receive the state or federal economic development grants or loans; and the city/county still has available funds. The letter should be no older than 6 months from the first day of the Application Acceptance Period. (General Appropriation Act, Article VII, Rider 3; §2306.127); or

(B) an area that has received an award as of November 1, 2008, within the past three years from the Texas Capital Fund, Texas or Federal Enterprise Zone Fund, Texas Leverage Fund, Industrial Revenue Bond Program, Emerging Technologies, Skills Development, Rural Business Enterprise Grants, Certified Development Company Loans, or Micro Loan Program or other state or federally funded economic development initiatives (This excludes limited highway improvement and roadwork projects, but does include broader regional transportation initiatives targeted to expanding economic development). Grants that qualify in these areas are included in the Application Reference Manual.

(C) Points under subparagraphs (A) and (B) of this paragraph will not be granted if more than 3 tax credit Developments have been awarded in that area in the last 7 years. The Applicant must provide evidence of the boundaries of the area, as required in the Application and Application Submission Procedures Manual.

(16) Development Location. (§2306.6725(a)(4)); §42(m)(1)(C)(i)). Applications may qualify to receive 4 points. Evidence, not more than 6 months old from the first day of the Application Acceptance Period, that the Development Site is located within one of the geographical areas described in subparagraphs (A) - (F) of this paragraph. Areas qualifying under any one of the subparagraphs (A) - (F) of this paragraph will receive 4 points. An Application may only receive points under one of the subparagraphs (A) - (F) of this paragraph.

(A) A geographical Area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD at the time of Application submission. (§2306.127)

(B) The Development is located in a county that has received an award as of November 1, 2008, within the past three years, from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(C) The Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census), that is higher than the median family income for the county in which the census tract is located. This comparison shall be made using the most recent data available as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county. These Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(D) The proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone of an elementary school that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (§42(m)(1)(C)(vii))

(E) The proposed Development will expand affordable housing opportunities for low-income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. Intergenerational Developments may qualify for points if 70% of the non-elderly Units in the Development have an eligible bedroom mix of two bedrooms or more. (§42(m)(1)(C)(vii)). These Census Tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report.

(F) The proposed Development is located in an Urban Core, that is properly zoned for the intended use and provides infill housing.

(17) Green Building Initiatives. Application may qualify to receive up to 6 points for providing green building amenities (points under this paragraph may not be requested for the same items utilized for points under subsection (h)(4)(A)(ii)(XXV), Threshold Amenities):

(A) evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(B) passive solar heating/cooling (3 points);

(C) water conservation fixtures (toilets using less than or equal to 1.6 gallons per flush, showerheads, kitchen faucets or bathroom faucets using less than or equal to 2.0 gallons per minute) (1 point for each);

(D) solar water heaters (2 points);

(E) water collection (at least 50%) for irrigation purposes (2 points);

(F) sub-metered utility meters (3 points);

(G) Energy-Star qualified windows and glass doors (2 points);

(H) thermally and draft efficient doors (SHGC of 0.40 and U-value specified by climate zone according to the 2006 IECC) (2 points);

(I) photovoltaic panels for electricity and design and wiring for use of such panels (4 points);

(J) construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (2 points);

(K) recycle service provided throughout the compliance period (1 point);

(L) water permeable walkways (1 point);

(M) selection of native trees and plants that are appropriate to the site's soils and microclimate and locate them to provide shading in the summer and allow for heat gain in the winter (2 points);

(N) exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria (2 points);

(O) HVAC, windows, domestic hot water heater or insulation that exceeds Energy Star standards or exceeds the IRC 2006 (2 points); or

(P) bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (2 points).

(18) Demonstration of Community Input other than Quantifiable Community Participation: 49if an Application was awarded 12 points under paragraph (2) of this subsection, then that Application may receive up to 6 points for letters that qualify for points under subparagraphs (A), (B) or (C) of this paragraph.An Application may not receive points under more than one of the subparagraphs (A) - (C). All letters must be received by February 27, 2009 for the Application to receive these points.

(A) An Application may receive two points (maximum of 6 points) for each letter of support submitted from a community or civic organization that serves the community in which the site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. The community or civic organization must provide some documentation of its existence in the community in which the Development is located to include, but not be limited to, listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that are not active in the area that includes the location of the Development will not be counted. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), taxing entities or educational activities. Organizations that were created by a governmental entity or derive their source of creation from a governmental entity do not qualify under this item. For purposes of this item, educational activities include school districts, trade and vocational schools, charter schools and depending on how characterized could include day care centers; it would not include a PTA or PTO as that is a service organization even though it supports an educational activity. Should an Applicant elect this option and the Application receives letters in opposition by February 27, 2009, then two points will be subtracted from the score for each letter in opposition, provided that the letter is from an organization serving the community. At no time will the Application receive a score lower than zero for this item.

(B) An Application may receive 6 points for a letter of support, from a property owners association created for a master planned community whose boundaries include the development site, that does not meet the requirements of a Neighborhood Organization for points under paragraph (2) of this subsection.

(C) An Application may receive 6 points for a letter of support from a Special Management District, whose boundaries, as of February 27, 2009, include the Development Site and for which there is not a Neighborhood Organization on record with the county or state. At no time will the Application receive a score lower than zero for this item.

(19) Developments in Census Tracts with No Other Existing Same Type Developments Supported by Tax Credits: The Application may receive 6 points if the proposed Development is located in a census tract in which there are no other existing Developments supported by Housing Tax Credits that serve the same type of household, regardless of whether the development serves families, or elderly individuals (Intergenerational Housing is not a type of household as it relates to this paragraph). Applicant must provide evidence of the census tract in which the Development is located. (§2306.6725(b)(2)). These Census Tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report.

(20) Tenant Populations with Special Housing Needs. Applications may qualify to receive 4 points for this item. (§42(m)(1)(C)(v)). The Department will award these points to Applications in which at least 10% of the Units are set aside for Persons with Special Needs. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum 12 month period during which Units must either be occupied by Persons with Special Needs or held vacant. The 12 month period will begin on the date each building receives its certificate of occupancy. For buildings that do not receive a Certificate of Occupancy, the 12 month period will begin on the placed in service date as provided in the Cost Certification manual. After the 12 month period, the owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

(21) Length of Affordability Period. Applications may qualify to receive up to 4 points. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and §42(m)(1)(B)(ii)(II)). In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the 30 years required in the Code may receive points as follows:

(A) Add 5 years of affordability after the extended use period for a total affordability period of 35 years (2 points); or

(B) Add 10 years of affordability after the extended use period for a total affordability period of 40 years. (4 points)

(22) Site Characteristics. Development Sites, including scattered sites, will be evaluated based on proximity to amenities, the presence of positive site features and the absence of negative site features. Sites will be rated based on the criteria in subparagraphs (A) and (B) of this paragraph.

(A) Proximity of site to amenities. Developments Sites located within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three services appropriate to the target population will receive four points. A site located within one-quarter mile of public transportation that is accessible to all residents including Persons With Disabilities and/or located within a community that has "on demand" transportation, special transit service, or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or on demand service, then this will be a requirement of the LURA. Only one service of each type listed in clauses (i) - (xiv) of this subparagraph will count towards the points. A map must be included identifying the Development Site and

the location of the services. The services must be identified by name on the map. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be at least 50% complete by the date the Application is submitted. (4 points)

(i) Full service grocery store or supermarket.

(ii) Pharmacy.

(iii) Convenience Store/Mini-market.

(iv) Department or Retail Merchandise Store.

(v) Bank/Credit Union.

(vi) Restaurant (including fast food).

(vii) Indoor public recreation facilities, such as civic centers, community centers, and libraries.

(viii) Outdoor public recreation facilities such as parks, golf courses, and swimming pools.

(ix) Hospital/medical clinic.

(x) Medical offices (physician, dentistry, optometry).

(xi) Public Schools (only eligible for Developments that are not Qualified Elderly Developments).

(xii) Senior Center.

(xiii) Dry cleaners.

(xiv) Family video rental (Blockbuster, Hollywood Video, Movie Gallery).

(B) Negative Site Features. Development Sites with the following negative characteristics will have points deducted from their score. For purpose of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from all boundaries of the Development Site to all boundaries of the property containing the negative site feature. If an Applicant negligently fails to note a negative feature, double points will be deducted from the score or the Application may be terminated. If none of these negative features exist, the Applicant must sign a certification to that effect. (-6 points)

(i) Developments located adjacent to or within 300 feet of junkyards will have 1 point deducted from their score.

(ii) Developments located adjacent to or within 300 feet of active railroad tracks will have 1 point deducted from their score, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail. Rural Developments funded through TRDO-USDA are exempt from this point deduction.

(iii) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants will have 1 point deducted from their score.

(iv) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills will have 1 point deducted from their score.

(v) Developments where the buildings are located within the "fall line" of high voltage transmission power lines will have 1 point deducted from their score.

(vi) Developments where the buildings are located within the accident zones or clear zones for commercial or military airports will have 1 point deducted from their score.

(23) Development Size. The Development consists of not more than 36 Units (3 points).

(24) Qualified Census Tracts with Revitalization. Applications may qualify to receive 1 point for this item. (§42(m)(1)(B)(ii)(III)). Applications will receive the points for this item if the Development is located within a Qualified Census Tract and contributes to a concerted Community Revitalization Plan. Evidence of the Community Revitalization Plan and a letter from the chief executive officer or other local official with appropriate jurisdiction of the local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted.

(25) Sponsor Characteristics. Applications may qualify to receive a maximum of 2 points for this item for qualifying under either subparagraph (A) or (B) of this paragraph. (§42(m)(1)(C)(iv))

(A) An Application will receive these two points for submitting a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Applicant will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609.

(B) An Application will receive these points if there is evidence that a HUB that does not meet the experience requirements under subsection (g) of this section, as certified by the Texas Comptroller of Public Accounts, has at least 51% ownership interest in the General Partner and materially participates in the Development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Comptroller of Public Accounts that the Person is a HUB at the close of the Application Acceptance Period. The HUB will be disqualified from receiving these points if any Principal of the HUB has developed, and received 8609's for, more than two Developments involving tax credits. Additionally, to qualify for these points, the HUB must partner with an experienced Developer (as defined by subsection (g) of this section); the experienced Developer, as an Affiliate, will not be subject to the credit limit described under §49.6(d) of this chapter for one Application per Application Round. For purposes of this section the experienced Developer may not be a Related Party to the HUB.

(26) Developments Intended for Eventual Tenant Ownership - Right of First Refusal. Applications may qualify to receive 1 point for this item. (§2306.6725(b)(1)); (§42(m)(1)(C)(viii)). Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms.

(A) Upon the earlier to occur of:

(i) The Development Owner's determination to sell the Development; or

(ii) The Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within

the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) During the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. §92.1 (a "CHDO") and is approved by the Department;

(ii) During the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) During the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) The end of the Compliance Period; or

(ii) Two years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(27) Leveraging of Private, State, and Federal Resources. Applications may qualify to receive 1 point for this item. (§2306.6725(a)(3)). Funding sources used for points under paragraph (5) of this subsection, may not be used for this point item.

(A) Evidence must be submitted in the Application that the proposed Development has received or will receive loan(s), grant(s) or in-kind contributions from a private, state or federal resource, which include Capital Grant Funds and HOPE VI funds, that is equal to or greater than 2% (do not round) of the Total Housing Development Costs reflected in the Application.

(B) For in-kind contributions, evidence must be submitted in the Application from a private, state or federal resource which substantiates the value of the in-kind contributions. Development based rental subsidies from private, state or federal resource may qualify under this section if evidence of the remaining value of the contract is submitted from the source. The value of the contract does not include past subsidies.

(C) Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds.

(D) Applicants may only submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, two sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost. However, two sources may not be submitted if each source is for an amount equal to 2% of the Total Housing Development Cost.

(E) The funding must be in addition to the primary funding (construction and permanent loans) that is proposed to be utilized and cannot be issued from the same primary funding source or an affiliated source. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision.

(F) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. At the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the Governing Body of the entity for the sufficient financing to the Department. If the funding commitment from the private, state or federal source, or qualifying substitute source, has

not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the commitment from the private, state or federal source, the Commitment Notice will be rescinded and the credits reallocated. Funds from the Department's HOME and Housing Trust Fund sources will only qualify under this category if there is a Notice of Funding Availability (NOFA) out for available funds and the Applicant is eligible under that NOFA.

(G) To qualify for this point, the Rent Schedule must show that at least 3% (not using normal rounding) of all low-income Units are designated to serve individuals or families with incomes at or below 30% of AMGI.

(28) Third-Party Funding Commitment Outside of Qualified Census Tracts. Applications may qualify to receive 1 point for this item. (§2306.6710(e)(1)). Evidence that the proposed Development has documented and committed Third-Party funding sources and the Development is located outside of a Qualified Census Tract. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The commitment of funds (an application alone will not suffice) must already have been received from the Third-Party funding source and must be equal to or greater than 2% (do not round) of the Total Development Costs reflected in the Application. Funds from the Department's HOME and Housing Trust Fund sources will not qualify under this category. The Third-Party funding source cannot be a loan from a commercial lender.

(29) Bonus Points. Applications may qualify to receive up to 6 points for this item.

(A) An Application may receive 2 points if the Applicant had submitted acceptable proof of site control at the time of Carryover (November 1, 2008) for Applications that received a Housing Tax Credit commitment made in the Application Round preceding the current round. For purposes of this subparagraph, evidence of site control will consist of an executed deed for the subject property bearing the marks of receipt for filing by the county clerk and confirming the Development Owner as the grantee;

(B) An Application may receive 2 points if the Applicant has submitted the complete, acceptable, required documentation for the 10% Test, on or before June 1 for Applications that received a Housing Tax Credit commitment made in the Application Round preceding the current round (Applications that request extensions of the June 1 date, are not eligible for these bonus points);

(C) An Application may receive 2 points for having 5 or less aggregate deficiencies through the combined Eligibility, Selection and Threshold reviews;

(D) An Application may receive 1 point for having 10 or less aggregate deficiencies through the combined Eligibility, Selection and Threshold reviews; and/or

(E) An Application may receive 1 point if an Applicant satisfies deficiencies, to the satisfaction of the Department, on or before the third business day following the date of the deficiency notice.

(30) Scoring Criteria Imposing Penalties. (§2306.6710(b)(2))

(A) Penalties will be imposed on an Application if the Applicant has requested an extension of the Carryover or 10% Test deadline, and did not meet the original submission deadline, relating to Developments receiving a Housing Tax Credit commitment made in the Application Round preceding the current round. For each extension request made, the Applicant will receive a 5 point deduction. No penalty points or fees will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(B) Penalties will be imposed on an Application if the Developer or Principal of the Applicant has been removed by the lender, equity provider, or limited partners in the past five years for failure to perform its obligations under the loan documents or limited partnership agreement. An affidavit will be provided by the Applicant and the Developer certifying that they have not been removed as described, or requiring that they disclose each instance of removal with a detailed description of the situation. If an Applicant or Developer submits the affidavit, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded. The Applicant, Developers or Principals of the Applicant that are in court proceedings at the time of Application must disclose this information and the situation will be evaluated on a case-by-case basis. 3 points will be deducted for each instance of removal.

(C) Penalties will be imposed on an Application if Developer or Principal of the Applicant violates the Adherence to Obligations pursuant to subsection (c) of this section.

(j) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(A) Applications involving any Rehabilitation or Reconstruction of existing Units will win this first tier tie breaker over Applications involving solely New Construction or Adaptive Reuse.

(B) The Application located in the municipality or, if located outside a municipality, the county that has the lowest state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins as reflected in the Reference Manual will win this second tier tie breaker.

(C) The amount of requested tax credits per net rentable square foot (the lower credits per square foot has preference).

(D) Projects that are intended for eventual tenant ownership. Such Developments must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 15-year compliance period.

(2) This paragraph identifies how ties will be handled when dealing with the restrictions on location identified in §49.5(a)(8) of this

chapter, and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the reservation docket number issued by the Texas Bond Review Board in making its determination. When two Competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breakers identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a Competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their reservation from the Bond Review Board on or before April 30, 2009 will take precedence over the Housing Tax Credit Applications in the 2009 Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July 2009 will take precedence over the Tax-Exempt Bond Developments that received their reservation from the Bond Review Board on or between May 1, 2009 and July 31, 2009; and

(C) After July 31, 2009, a Tax-Exempt Bond Development with a reservation from the Bond Review Board will take precedence over any Housing Tax Credit Application from the 2009 Application Round on the Waiting List. However, if no reservation has been issued by the date the Board approves an allocation to a Development from the Waiting List of Applications in the 2009 Application Round or a forward commitment, then the Waiting List Application or forward commitment will be eligible for its allocation.

(k) Staff Recommendations. (§2306.1112 and §2306.6731) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. The Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all factors provided in §49.10(a) of this chapter that were used in making this determination.

§49.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and Rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without good cause, a commitment decision that conflicts with the recommendations of Department staff. Good cause includes the Board's decision to apply discretionary factors. (§2306.6725(c); §2306.6731; and §42(m)(1)(A)(iv))

(2) In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph. The Board may also apply these discretionary factors to its consideration of Tax-Exempt Bond Developments. If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions (including those related to Tax-Exempt Bond Developments), the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors: (§2306.111(g)(3))

(A) The Developer market study;

(B) The location;

(C) The compliance history of the Developer;

(D) The financial feasibility;

(E) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(F) The Development's proximity to other low-income housing Developments;

(G) The availability of adequate public facilities and services;

(H) The anticipated impact on local school districts;

(I) Zoning and other land use considerations;

(J) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(K) Other good cause as determined by the Board.

(3) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development, including compliance information provided by the Texas State Affordable Housing Corporation. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development or Applicant. (§2306.057)

(b) Waiting List. (§2306.6711(c) and (d)). If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of commitments, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the Waiting List. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside allocation and 15% At-Risk Set-Aside allocation and 5% TRDO-USDA Set-Aside required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Applications from the State Housing Credit Ceiling for the calendar year following the

year of issuance (each a "forward commitment") to Applications submitted in accordance with the rules and timelines required under this rule and the Application Submission Procedures Manual. The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments considering score and discretionary factors. The Board may utilize the forward commitment authority to allocate credits to TRDO-USDA Developments which are experiencing foreclosure or loan acceleration at any time during the 2009 calendar year, also referred to as Rural Rescue Developments. Applications that are submitted under the 2009 QAP and granted a Forward Commitment of 2010 Housing Tax Credits are considered by the Board to comply with the 2010 QAP by having satisfied the requirements of this 2009 QAP, except for statutorily required QAP changes.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the Credit Ceiling from which the credits are allocated.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§49.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately 14 days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its web site. Such log shall contain the Development name, address, Set-Aside, number of Units, requested credits, owner contact name and phone number. (§2306.6717(a)(1))

(2) Approximately 30 days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its web site.

(3) Not later than 14 days after the close of the Pre-Application Acceptance Period, or Application Acceptance Period for Applications for which no Pre-Application was submitted, the Department shall: (§2306.1114)

(A) Publish an Application submission log on its web site.

(B) Give notice of a proposed Development in writing that provides the information required under clause (i) of this subparagraph to all of the individuals and entities described in clauses (ii) - (x) of this subparagraph. (§2306.6718(a)-(c))

(i) The following information will be provided in these notifications:

(I) The relevant dates affecting the Application including the date on which the Application was filed, the date or dates on which any hearings on the Application will be held and the date by which a decision on the Application will be made;

(II) A summary of relevant facts associated with the Development;

(III) A summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(IV) The name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

(ii) Presiding officer of the Governing Body of the political subdivision containing the Development (mayor or county judge) to advise such individual that the Development, or a part thereof, will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development.

(iii) If the Department receives a letter from the mayor or county judge of an affected city or county that expresses opposition to the Development, the Department will give consideration to the objections raised and will offer to visit the proposed site or Development with the mayor or county judge or their designated representative within 30 days of notification. The site visit must occur before the Housing Tax Credit can be approved by the Board. The Department will obtain reimbursement from the Applicant for the necessary travel and expenses at rates consistent with the state authorized rate; (General Appropriation Act, Article VII, Rider 5) (§42(m)(1))

(iv) Any member of the Governing Body of a political subdivision who represents the Area containing the Development. If the Governing Body has single-member districts, then only that member of the Governing Body for that district will be notified, however if the Governing Body has at-large districts, then all members of the Governing Body will be notified;

(v) State representative and state senator who represent the community where the Development is proposed to be located. If the state representative or senator host a community meeting, the Department, if timely notified, will ensure staff are in attendance to provide information regarding the Housing Tax Credit Program; (General Appropriation Act, Article VII, Rider 8(d))

(vi) United States representative who represents the community containing the Development;

(vii) Superintendent of the school district containing the Development;

(viii) Presiding officer of the board of trustees of the school district containing the Development;

(ix) Any Neighborhood Organizations on record with the city or county in which the Development is to be located and whose boundaries contain the proposed Development site or otherwise known to the Applicant or Department and on record with the state or county; and

(x) Advocacy organizations, social service agencies, civil rights organizations, tenant organizations, or others who may have an interest in securing the development of affordable housing that are registered on the Department's email list service.

(C) The Department shall maintain an electronic mail notification service that will notify a subscriber, by zip code, of: (§2306.67171)

(i) The receipt of a Pre-Application or Application within 14 days of receipt;

(ii) The publication of materials to be presented to the Board for the Pre-Application or Application referred to in clause (i) of this subparagraph; and

(iii) Any public hearing for the Pre-Application or Application referred to in clause (i) of this subparagraph.

(D) The elected officials identified in subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process. (§42(m)(1))

(4) The Department shall hold at least three public hearings in different Uniform State Service Regions of the state to receive comment on the submitted Applications and on other issues relating to the Housing Tax Credit Program for competitive Applications under the State Housing Credit Ceiling. (§2306.6717(c))

(5) The Department shall make available on the Department's website information regarding the Housing Tax Credit Program including notice of public hearings, meetings, Application Round opening and closing dates, submitted Applications, and Applications approved for underwriting and recommended to the Board, and shall provide that information to locally affected community groups, local and state elected officials, local housing departments, any appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, nonprofit and for-profit organizations, on-site property managers of occupied Developments that are the subject of Applications for posting in prominent locations at those Developments, and any other interested persons including community groups, who request the information. (§2306.6717(b))

(6) Approximately forty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of completion of each stage of the Application process, including the results of the Application scoring and underwriting phases and the commitment phase, the results will be posted to the Department's web site. (§2306.6717(a)(3))

(8) At least thirty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will:

(A) Provide the Application scores to the Board; (§2306.6711(a)) and

(B) If feasible, post to the Department's web site the entire Application, including all supporting documents and exhibits, the Application Log as further described in §49.19(b) of this chapter, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application. (§2306.6717(a)(1) and (2))

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 30 business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for Housing Tax Credits, the Department shall provide an Applicant who did not receive a commitment for Housing Tax Credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting. (§2306.6711(e))

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Application periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Texas Government Code. (§2306.6717(d))

§49.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

(a) Filing of Applications for Tax-Exempt Bond Developments. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2009 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 12:00 p.m. on December 29, 2008. Such filing must be accompanied by the Application fee described in §49.20 of this chapter.

(2) Applicants which receive advance notice of a Program Year 2009 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §49.20 of this chapter prior to the Applicant's bond reservation date as assigned by the TBRB. Those Applications designated as Priority 3 by the TBRB must submit Volumes I and II within 14 days of the bond reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. Any outstanding documentation required under this section regardless of Priority must be submitted to the Department at least 60 days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is requested by the Applicant. The Department staff will have limited discretion to recommend an Application with appropriate justification of the late submission.

(3) Applications involving multiple sites must submit the required information as outlined in the Application Submission Procedures Manual. The Application will be considered to be one Application as identified in Chapter 1372, Texas Government Code.

(b) Applicability of Rules for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications are subject to all rules in this chapter, with the only exceptions being the following sections: §49.4 of this chapter (regarding State Housing Credit Ceiling), §49.7 of this chapter (regarding Regional Allocation and Set-Asides), §49.8 of this chapter (regarding Pre-Application), §49.9(d) and (f) of this chapter (regarding Evaluation Processes for

Competitive Applications and Rural Rescue Applications), §49.9(i) of this chapter (regarding Selection Criteria), §49.10(b) and (c) of this chapter (regarding Waiting List and Forward Commitments), and §49.14(a) and (b) of this chapter (regarding Carryover and 10% Test). Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §49.9(h) of this chapter. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. Applicants will be required to meet all conditions of the Determination Notice by the time the construction loan is closed unless otherwise specified in the Determination Notice. Applicants must meet the requirements identified in §49.15 of this chapter. No later than 60 days following closing of the bonds, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan (as further described in the Carryover Allocation Procedures Manual), and evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five hours. Certifications must not be older than two years. Applications that receive a reservation from the Bond Review Board on or before December 31, 2008 will be required to satisfy the requirements of the 2008 QAP; Applications that receive a reservation from the Bond Review Board on or after January 1, 2009 will be required to satisfy the requirements of the 2009 QAP.

(c) Supportive Services for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) - (3) of this subsection include:

(1) The services must be in at least one of the following categories: child care, transportation, notary public service, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, organized team sports programs, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities;

(2) Any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or

(3) Any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Code §42(m)(2)(D) requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and Guidelines, §1.32 of this title or request that the Department perform the function. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by Code §42(m)(2)(D), that the Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director.

(e) Satisfaction of Requirements for Tax-Exempt Bond Developments. If the Department staff determines that all requirements of this QAP and Rules have been met, the Department will recommend that the Board authorize the issuance of a Determination Notice. The Board, however, may utilize the discretionary factors identified in §49.10(a) of this chapter in determining if they will authorize the Department to issue a Determination Notice to the Development Owner. The Determination Notice, if authorized by the Board, will confirm that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

(f) Certification of Tax Exempt Applications with New Docket Numbers. Applications that are processed through the Department review and evaluation process and receive an affirmative Board Determination, but do not close the bonds prior to the bond reservation expiration date, and subsequently have that docket number withdrawn from the Bond Review Board, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the Texas Bond Review Board. One of the following must apply:

(1) The new docket number must be issued in the same program year as the original docket number and must not be more than four months from the date the original application was withdrawn from the BRB. The application must remain unchanged. This means that at a minimum, the following can not have changed: site control, total number of units, unit mix (bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, target population, scoring criteria (TDHCA issues) or BRB priority status including the effect on the inclusive capture rate. Note that the entities involved in the Applicant entity and Developer can not change; however, the certification can be submitted even if the lender, syndicator

or issuer changes, as long as the financing structure and terms remain unchanged. Notifications under §49.9(h)(8) of this chapter are not required to be reissued. In the event that the Department's Board has already approved the Application for tax credits, the Application is not required to be presented to the Board again (unless there is public opposition) and a revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty days after the date the Bond Review Board issues the new docket number and no later than thirty days before the anticipated closing. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. This certification must be submitted no later than thirty days after the date the Bond Review Board issues the new docket number and no later than forty-five days before the anticipated Department's Board meeting date.

(2) If there are changing to the Application as referenced in paragraph (1) of this subsection, the Application will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new determination notice to be issued.

§49.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

(a) Commitment and Determination Notices. If the Board approves an Application the Department will:

(1) If the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) Confirm that the Board has approved the Application; and

(B) State the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in §49.16 of this chapter, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice, pays the required fee specified in §49.20 of this chapter, and satisfies any other conditions set forth therein by the Department. The Commitment Notice expiration date may not be extended.

(2) If the Application regards a Tax-Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) Confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) State the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth in §49.12 of this chapter and compliance by the Development Owner with all applicable requirements of this chapter and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §49.20 of this chapter. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department. The Determination Notice expiration may not be extended.

(3) Notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or Rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(5) A Commitment or Determination Notice shall not be issued with respect to the Applicant, the Development Owner, the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low-income rental housing properties in the state of Texas administered by the Department that is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for such property, as described in Chapter 60 of this title.

(6) The executed Commitment or Determination Notice must be returned to the Department on the date specified within the Commitment Notice or Determination Notice, which shall be no earlier than ten days of the effective date of the Notice.

(b) Agreement and Election Statement. Together with the Development Owner's acceptance of the Carryover Allocation, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage for the Development as that for the month in which the Carryover Allocation was accepted (or the month the bonds were closed for Tax-Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development, the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department staff will cooperate with a Development Owner, as possible or reasonable; to assure that the Carryover Allocation Document can be so executed.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the date the Commitment Notice or Determination Notice is executed by the Applicant and returned to the Department with the appropriate Commitment or Determination Fee as further described in §49.20(f) of this chapter, the following documents must also be provided to the Department. Failure to provide these documents may cause the Commitment or Determmination to be rescinded. For each Applicant all of the following must be provided:

(1) Evidence that the entity has the authority to do business in Texas;

(2) A Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Organization from the Secretary of State;

(3) Copies of the entity's governing documents, including, but not limited to, its Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, Bylaws, Regulations and/or Partnership Agreement; and

(4) Evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents.

§49.14. Carryover; 10% Test; Commencement of Substantial Construction.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 1 of the year in which the Commitment Notice is issued pursuant to §42(h)(I)(c) IRC.

(1) Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment Notice is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month.

(2) If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be reevaluated by the Department.

(3) The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual.

(4) All Carryover Allocations will be contingent upon the Development Owner providing evidence that the Development site is still under control of the Development Owner. For purposes of this paragrapg, site control must be identical to the same Development Site that was submitted at the time of Application Submission.

(5) The Department will not execute a Carryover Allocation Agreement with any Owner in Material Noncompliance on October 1, 2009.

(6) The Development Owner may receive bonus points, as referenced in §49.9(i)(29) of this chapter, in the Application Round following the execution of the Carryover Allocation Agreement, if the Development Owner provides evidence of the purchase, transfer, lease or otherwise has ownership, of the Development Site, at the time of submission of the Carryover documentation.

(b) 10% Test. No later than eleven months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code (as amended by The Housing and Economic Recovery Act of 2008) and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than December 1 of the year following the execution of the Carryover Allocation Document in a format prescribed by the Department. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. Evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five hours on or before the time the 10% Test Documentation is submitted. Certifications must not be older than two years from the date of submission of the 10% Test Documentation. The 10% Test Documentation will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) The Development Owner for all Developments must have purchased, transferred, leased or otherwise have ownership, of the Development Site.

(2) A current original plat or survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual.

(3) For all Developments involving New Construction or Adaptive Reuse, evidence of the availability of all necessary utilities/services to the Development site must be provided. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the Development Owner. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development property. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(4) The Development Owner must submit evidence of having commenced and continued substantial construction activities as defined in Chapter 60 of this title.

(5) The Development Owner may receive bonus points, as referenced in §49.9(i)(29) of this chapter, in the Application Round following the execution of the Carryover Allocation Agreement, if the Development Owner provides evidence that the requirements of the 10% Test were met, on or before June 1 in the year following the execution of the Carryover Allocation Agreement (with the exception of the documentation required in paragraph (4) of this subsection), and submits the complete documentation, to the Department, on or before June 1 in the year following the execution of the same Carryover Allocation Agreement. The submission of the commencement of substantial construction documentation, as referenced in paragraph (4) of this subsection, will be required on or before December 1 of the year following the Carryover Allocation Agreement.

§49.15. LURA, Cost Certification.

(a) Land Use Restriction Agreement (LURA). The Development Owner must request a LURA from the Department no later than the date specified in Chapter 60 of this title, the Department's Compliance Rules. The Development Owner must date, sign and acknowledge before a notary public the LURA and send the original to the Department for execution. The initial compliance and monitoring fee must be accompanied by a statement, signed by the Owner, indicating the start of the Development's Credit Period and the earliest placed in service date for the Development buildings. After receipt of the signed LURA from the Department, the Development Owner shall then record the LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department no later than the date that

the Cost Certification Documentation is submitted to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department, or assigns, shall physically inspect the Development for compliance with the Application and the representations, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax-Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA. The LURA shall contain any provision which requires the Development Owner to restrict rents and incomes at any AMGI level, as approved by the Board. The restricted gross rents for any AMGI level outlined in the LURA will be calculated in accordance with §42(g)(2)(A), Internal Revenue Code.

(b) Cost Certification. The Cost Certification Procedures Manual sets forth the documentation required for the Department to perform a feasibility analysis in accordance with §42(m)(2)(C)(i)(II), Internal Revenue Code, and determine the final Credit to be allocated to the Development.

(1) To request IRS Forms 8609, Developments must have:

(A) Placed in Service by December 31 of the year the Commitment Notice was issued if a Carryover Allocation was not requested and received; or December 31 of the second year following the year the Carryover Allocation Agreement was executed;

(B) Scheduled a final construction inspection in accordance with Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures;

(C) Informed the Department of and received written approval for all Development amendments in accordance with §49.17(c) of this chapter;

(D) Submitted to the Department the LURA in accordance with subsection (a) of this section;

(E) Paid all applicable Department fees; and

(F) Prepared all Cost Certification documentation as more fully described in the Cost Certification Procedures Manual including:

(i) Carryover Allocation Agreement/Determination Notice and Election Statement;

(ii) Owner's Statement of Certification;

(iii) Owner Summary;

(iv) Evidence of Nonprofit and CHDO Participation;

(v) Evidence of Historically Underutilized Business (HUB) Participation;

(vi) Development Summary;

(vii) As-Built Survey;

(viii) Closing Statement;

(ix) Title Policy;

(x) Evidence of Placement in Service;

(xi) Independent Auditor's Reports;

(xii) Total Development Cost Schedule;

(xiii) AIA Form G702 and G703, Application and Certificate for Payment;

(xiv) Rent Schedule;

(xv) Utility Allowance;

(xvi) Annual Estimated Operating Expenses and 15-Year Proforma;

(xvii) Current Annual Operating Statement and Rent Roll;

(xviii) Final Sources of Funds;

(xix) Executed Limited Partnership Agreement;

(xx) Loan Agreement or Firm Commitment;

(xxi) Architect's Certification of Fair Housing Requirements; and

(xxii) TDHCA Compliance Workshop Certificate.

(2) Required Cost Certification documentation must be received by the Department no later than January 15 following the year the Credit Period begins. Any Developments issued a Commitment Notice or Determination Notice that fails to submit its Cost Certification documentation by this deadline will be reported to the IRS and the Owner will be required to submit a request for extension consistent with §49.20(l) of this chapter.

(3) The Department will perform an initial evaluation of the Cost Certification documentation within 45 days from the date of receipt and notify the Owner in a deficiency letter of all additional required documentation. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator. The Department will issue IRS Forms 8609 no later than 90 days from the date that all required documents have been received.

(4) The Department will perform an evaluation to determine if the Applicant is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject property, as described in Chapter 60 of this title, prior to issuance of IRS Forms 8609.

§49.16. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Application to determine whether a building is eligible for the credit under the Code, §42. The Development Owner shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Development Owner who receives a Housing Credit Allocation from the Department will qualify for the tax credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the affordability period. (§2306.6711(b)). Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount

specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any Applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Development Owner must meet specific criteria as defined by the General Appropriation Act, Article VII, Rider 8(c). A General Contractor hired by a Development Owner or a Development Owner, if the Development Owner serves as General Contractor must demonstrate a history of constructing similar types of housing without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §49.9(h)(4)(I) of this chapter, which sufficiently documents that the General Contractor has constructed some housing without the use of Housing Tax Credits. This documentation will be required as a condition of the Commitment Notice or Carryover Allocation Agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Development Owner identified in the related Commitment Notice or Determination Notice. If an allocation is made to a member or Affiliate of the ownership entity proposed at the time of Application, the Department will transfer the allocation to the ownership entity as consistent with the intention of the Board when the Development was selected for an award of tax credits. Any other transfer of an allocation will be subject to review and approval by the Department consistent with §49.17(c) of this chapter. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete current documentation regarding the owner including documentation to show consistency with all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.20 of this chapter have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax-Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accessibility specialist to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications are received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for Housing Tax Credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate Housing Credit Allocation shall be made with respect to each building within a Development which is eligible for a tax credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings. The Department may delay the issuance of IRS Form 8609 if any Development violates the representations of the Application.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum Applicable Percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The Housing Credit Allocation made by the Department shall not exceed the amount necessary to support the extended low-income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to construction threshold criteria and Development characteristics identified at application. At a minimum, all Development inspections must meet Uniform Physical Condition Standards (UPCS) as referenced in Treasury Regulation §1.42-5(d)(2)(ii) and include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent Third Party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §49.20 of this chapter. Details regarding the construction inspection process are set forth in the Department Rule Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures (§2306.081; General Appropriation Act, Article VII, Rider 8(b)).

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document and as further outlined in §49.15 of this chapter, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. For purposes of this title, and consistent with IRS Notice 88-116, the placed in service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function and more specifically when the first Unit in the building is certified as being suitable for occupancy in accordance with state and local law and as certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the New Construction or Rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Development Owner does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board at its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity.

(k) If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Department will impose a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate of that Applicant for any Application in an Application Round occurring concurrent to the return of credits or if no Application Round is pending the Round immediately following the return of credits unless otherwise exempted in accordance with the Board's policy pursuant to the implementation of The Housing and Economic Recovery Act of 2008, H.R. 3221, in September 2008. The penalty will be assessed in an amount that reduces the Applicant's final awarded score by an additional 20%.

§49.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

(a) Board Reevaluation. (§2306.6731(b)). Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (d)(4) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. (§2306.6715) An Applicant may appeal decisions made by the Department as follows.

(1) The decisions that may be appealed are identified in subparagraphs (A) - (D) of this paragraph.

(A) A determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-Application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) The scoring of the Application under the Application Selection Criteria; and

(C) A recommendation as to the amount of Housing Tax Credits to be allocated to the Application.

(D) Any Department decision that results in termination of an Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of any stage of the Application evaluation process identified in §49.9 of this chapter. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of Housing Tax Credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) The seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) The third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph.

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final.

(6) The Department will post to its web site an appeal filed with the Department or Board and any other document relating to the processing of the appeal. (§2306.6717(a)(5))

(c) Provision of Information or Challenges Regarding Applications from Unrelated Entities to the Application. The Department will address information or challenges received from unrelated entities to a specific 2009 active Application, utilizing a preponderance of the evidence standard, as stated in paragraphs (1) - (3) of this subsection, provided the information or challenge includes a contact name, telephone number, fax number and e-mail address of the person providing the information or challenge and must be received by the Department no later than June 15, 2009:

(1) Within 14 business days of the receipt of the information or challenge, the Department will post all information and challenges received (including any identifying information) to the Department's website;

(2) Within seven business days of the receipt of the information or challenge, the Department will notify the Applicant related to the information or challenge. The Applicant will then have seven business days to respond to all information and challenges provided to the Department; and

(3) Within 14 business days of the receipt of the response from the Applicant, the Department will evaluate all information submitted and other relevant documentation related to the investigation. This information may include information requested by the Department relating to this evaluation. The Department will post its determination summary to its website. Any determinations made by the Department cannot be appealed by any party unrelated to the Applicant.

(d) Amendment of Application Subsequent to Allocation by Board. (§2306.6712 and §2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of a Housing Tax Credit, or if the Applicant has altered any selection criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §49.18 of this chapter shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments which require Board approval, the amendment request must be received by the Department at least 30 days prior to the Board meeting where the amendment will be considered.

(3) The Board must vote on whether to approve an amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of Housing Tax Credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of 3% or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least 5%;

(G) an increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) Reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) Preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's web site.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the Real Estate Analysis Report at the time of the Commitment Notice issuance, as approved by the Board, the following procedure will apply. For amendments that involve a reduction in the total number of low-income Units being served, or a reduction in the number of low-income Units at any level of AMGI, as approved by the Board, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request, however, any affirmative recommendation to the Board is contingent upon concurrence from the Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development. Additionally, if it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(e) Housing Tax Credit and Ownership Transfers. (§2306.6713) A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development supported with an allocation of Housing Tax Credits to any Person other than an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department.

(2) A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the Credit Cap further described in §49.6(d) of this chapter, the credit cap will not be applied in the following circumstances:

(A) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(B) In cases where the General Partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(f) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725(b)(1), Texas Government Code and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) During the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the Federal Home Investment Partnership Program (HOME);

(B) During the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) During the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §49.9(i) of this chapter, a Development Owner may sell the Development to any purchaser after the expiration of the compliance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. §42(i)(7)), and the Department declines to purchase the Development.

(g) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(h) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) The Applicant or the Development Owner, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(2) Any statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §49.5 of this chapter if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) The Applicant or the Development Owner or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

(i) Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

§49.18. Compliance Monitoring and Material Noncompliance.

The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for compliance with the provisions of the Code, §42 and in notifying the IRS of any noncompliance of which the Department becomes aware. Detailed compliance rules and procedures for monitoring are set forth in Chapter 60 of this title.

§49.19. Department Records; Application Log; IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(2) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(3) The cumulative amount of Housing Credit Allocations made during such calendar year; and

(4) The remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. (§2306.6702(a)(3) and §2306.6709) The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) The names of the Applicant and all General Partners of the Development Owner, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) The name, physical location, and address of the Development, including the relevant Uniform State Service Region of the state;

(3) The number of Units and the amount of Housing Tax Credits requested for allocation by the Department to the Applicant;

(4) Any Set-Aside category under which the Application is filed;

(5) The requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) Any decision made by the Department or Board regarding the Application, including the Department's decision regarding

whether to underwrite the Application and the Board's decision regarding whether to allocate Housing Tax Credits to the Development;

(7) The names of individuals making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) The amount of Housing Tax Credits allocated to the Development; and

(9) A dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes Housing Credit Allocations, a copy of each completed (as to Part I) IRS Form 8609, the original of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low-income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of the Carryover Allocation Agreement will be mailed or faxed to the Development Owner by the Department. The original of the Carryover Allocation Document will be retained by the Department and IRS Form 8610 Schedule A will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§49.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

(a) Timely Payment of Fees. All fees must be paid as stated in this section, unless the Executive Director has granted a waiver for specific extenuating and extraordinary circumstances. To be eligible for a waiver, the Applicant must submit a request for a waiver no later than 10 business days prior to the deadlines as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments. Payments made by check, for which insufficient funds are available, may cause the Application, Commitment or Allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $10 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Pre-Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)). For Tax Exempt Bond Developments with the Department as the issuer, the Applicant shall submit the following fees: $1,000 (payable to TDHCA), $2,000 (payable to Vinson & Elkins, Bond Counsel), and $5,000 (payable to the Texas Bond Review Board).

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $20 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $30 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as he managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)). For Tax Exempt Bond Developments with the Department as the Issuer the Applicant shall submit a tax credit application fee of $30 per unit and bond application fee of $10,000. For Tax-Exempt Bond Development refunding Applications, with the Department as the issuer, the Application Fee will be $10,000 unless the refunding is not required to have a TEFRA public hearing, in which case the fee will be $5,000. Those Applications utilizing a local issuer only need to submit the tax credit application fee.

(d) Refunds of Pre-Application or Application Fees. (§2306.6716(c)). Upon written request from the Applicant, the Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Pre-Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 50% of the review, and Threshold review prior to a deficiency issued will constitute 30% of the review. Deficiencies submitted and reviewed constitute 20% of the review. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 20% of the review, the site visit will constitute 20% of the review, Eligibility and Selection review will constitute 20%, and Threshold review will constitute 20% of the review, and underwriting review will constitute 20%. The Department must provide the refund to the Applicant not later than the 30th day after the date of request.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §49.9(d)(6), (e)(3), and (f)(6) of this chapter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the commitment fee established in subsection (f) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the Commitment or Determination notice, a Commitment or Determination fee equal to 5% of the annual Housing Credit Allocation amount. The Commitment or Determination fee shall be paid by check. If a Development Owner of an Application awarded Competitive Housing Tax Credits has paid a Commitment Fee and returns the credits by November 1, 2009, the Development Owner may receive a refund of 50% of the Commitment Fee. If a Development Owner of an Application awarded Housing Tax Credits associated with Tax-Exempt Bonds has paid a Determination Fee and is not able close on the bond transaction within 90 days of the determination by the Board, the Development Owner may receive a refund of 50% of the Determination Fee. The Determination Fee will not be refundable after the 90 days of the issuance of the Determination Notice.

(g) Compliance Monitoring Fee. Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax

credit unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. For Tax-Exempt Bond Developments with the Department as the issuer, the annual tax credit compliance fee will be paid in advance (for the duration of the compliance or affordability period) and is equal to $40/Unit beginning two years from the first payment date of the bonds; the bond compliance fee is paid in advance (for as long as the bonds are outstanding) and is equal to $15/Unit beginning two years from the first payment date of the bonds; the asset management fee is paid in advance and is equal to $25/Unit beginning two years from the first payment date. Compliance fees may be adjusted from time to time by the Department.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(i) Tax-Exempt Bond Credit Increase Request Fee. As further described in §49.12 of this chapter, requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to 5% of the amount of the credit increase for one year.

(j) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Texas Government Code, Chapter 552. The Department uses the guidelines promulgated by The Texas Facilities Commission to determine the cost of copying, and other costs of production.

(k) Periodic Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)). All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(l) Extension and Amendment Requests.

(1) All extension requests relating to the Carryover, Documentation for 10% Test, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department no later than the date for which an extension is being requested. All requests for extensions totaling less than 6 months may be approved by the Executive Director and are not required to have Board approval. For extensions that require Board approval, the extension request must be received by the Department at least 15 business days prior to the Board meeting where the extension will be considered. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment Notice was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items. If an extension is required at Cost Certification, the fee of $2,500 must be received by the Department to qualify for issuance of Forms 8609.

(2) Amendment requests must be submitted consistent with §49.17(d) of this chapter. Amendment requests shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable amendment fee in the form of a check in the amount of $2,500. The amendment request will not be considered received until the corresponding fee is received. The Board may waive related fees for good cause.

(m) Penalties. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of 8609's. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of form 8609's if the tax credits are not returned, and 8609's issued, within 180 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with §42, Internal Revenue Code.

§49.21. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department must be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this chapter shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or for hand delivery or courier to 221 East 11th Street, Austin, Texas 78701 or more current address of the Department as released on the Department's website. Every such correspondence required or contemplated by this chapter to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Regardless of method of delivery, documents must be received by the Department no later than 5:00 p.m. for the given deadline date. Notice by courier, express mail, certified mail, or registered mail will be considered received on the date it is officially recorded as delivered by return receipt or equivalent. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

(c) If required by the Department, Development Owners must comply with all requirements to use the Department's web site to provide necessary data to the Department.

§49.22. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules if the Board finds that waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

(b) Section 1.13 of this title may be waived for any person seeking any action by filing a request with the Board.

(c) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Texas Government Code, Chapter 2001.

§49.23. Deadlines for Allocation of Housing Tax Credits. (§2306.6724)

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program.

(b) The Board shall adopt and submit to the Governor the QAP not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the QAP not later than December 1 of each year. (§2306.67022) (§42(m)(1))

(d) The Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for Housing Tax Credits.

(e) Applications for Housing Tax Credits to be issued a Commitment Notice during the Application Round in a calendar year must be submitted to the Department not later than March 1.

(f) The Board shall review the recommendations of Department staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(g) The Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the Qualified Allocation Plan not later than July 31, unless unforeseen circumstances prohibit action by that date. In any event, the Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the Qualified Allocation Plan not later than September 30. Department staff will subsequently issue Commitment Notices based on the Board's approval. Final commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804838
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 51. HOUSING TRUST FUND RULE

10 TAC §§51.1 - 51.17

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (Department) proposes the repeal of 10 TAC Chapter 51, §§51.1 - 51.17, concerning the Housing Trust Fund Rule. The proposed repeal will allow the Department to make changes to the existing rules to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the Housing Trust Fund program manuals, and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rules.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the Housing Trust Fund program manuals, and further enhanced operations of the Housing Trust Fund program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on the proposed repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The repeal affects no other code, article or statute.

§51.1. Purpose.

§51.2. Definitions.

§51.3. Allocation of Housing Trust Funds.

§51.4. Basic Eligible Activities.

§51.5. Application Procedures and Requirements.

§51.6. Multifamily Development Application Requirements.

§51.7. Multifamily Development Applicants Requesting Additional Funding from Other Housing Finance Programs.

§51.8. Application Procedure and Requirements.

§51.9. Criteria for Funding.

§51.10. Process for Awards During Competitive Application Cycle.

§51.11. Contract Required after Award.

§51.12. Documents Supporting Mortgage Loans.

§51.13. Amendments.

§51.14. Other Program Requirements.

§51.15. Citizen Participation.

§51.16. Records to be Maintained.

§51.17. Waiver.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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10 TAC §§51.1 - 51.22

The Texas Department of Housing and Community Affairs (Department) proposes new 10 TAC Chapter 51, §§51.1 - 51.22, concerning the Housing Trust Fund Rule. The proposed new chapter makes changes to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the Housing Trust Fund program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rules.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new chapter is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the proposed new chapter is in effect the public benefit anticipated as a result of enforcing the new sections will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the Housing Trust Fund program manuals, and further enhanced operations of the Housing Trust Fund program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The new sections affect no other code, article or statute.

§51.1. Purpose.

This chapter clarifies the use and administration of the Housing Trust Fund. The Department shall use the Housing Trust Fund to provide loans, grants, or other comparable forms of assistance to local units of government, public housing authorities, for profit entities, nonprofit organizations, income-eligible individuals, families, and households to finance, acquire, rehabilitate, and develop decent, safe, and sanitary housing. The fund is created pursuant to §2306.201, Texas Government Code. The use of the Housing Trust Fund is limited to activities pursuant to §2306.202, Texas Government Code:

(1) assistance for individuals and families of low and very low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low and very low income;

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low and very low income; and

(4) subject to the limitations in §2306.251, Texas Government Code, the Department may also use the fund to acquire property to endow the fund.

§51.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Deficiencies--The absence of information or a document from the application as required in this rule or applicable NOFA.

(2) Administrator--The Person responsible for performing under a Contract with the Department.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest.

(4) Affiliated Party--A Person in a relationship with the Administrator on a Contract with the Department.

(5) Applicant--A Person who has submitted an Application for Department funds or other assistance.

(6) Application--A request for funds submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(7) Application Acceptance Period--The period of time that Applications may be submitted to the Department as more fully described in the applicable NOFA.

(8) Application Submission Procedures Manual ("ASPM")--The manual which sets forth the procedures, forms and instructions for the completion and submission of an Application to the Department.

(9) Area Median Family Income ("AMFI")--The income estimated and determined by HUD as the median family income with adjustments for family size and geographic locations.

(10) Articles of Incorporation--The document that sets forth the basic terms for a corporation's existence and is the official recognition of the corporation's existence.

(11) Board--The governing board of the Texas Department of Housing and Community Affairs.

(12) Bylaws--A rule or administrative provision adopted by a corporation for its internal governance. Bylaws are enacted apart from the Articles of Incorporation. Bylaws and amendments to By-

laws must be formally adopted in the manner prescribed by current Bylaws by either the organization's board of directors or the organization's members, whoever has the authority to adopt and amend Bylaws.

(13) Capacity Building--Educational and organizational support assistance to promote the ability of community housing development organizations and nonprofit organizations to maintain, rehabilitate and construct housing for low, very low, and extremely low-income persons and families. This activity may include:

(A) organizational support to cover expenses for housing development or management related training, technical and other assistance to the board of directors, staff, and members of the nonprofit organizations or community housing development organizations;

(B) technical assistance and training related to housing development, housing management, or other subjects related to the provision of housing or housing services; or

(C) studies and analyses of housing needs.

(14) Chapter 2306--The enabling statute for the Department found in Texas Government Code, Chapter 2306.

(15) Colonia--A geographic area that is located in a county some part of which is within 150 miles of the international border of this state that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that:

(A) has a majority population composed of individuals and families of low income and very low income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under §17.921, Texas Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Department.

(16) Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published NOFA. Applications will be reviewed in accordance with the rules for application review published in the NOFA, and the ASPM.

(17) Contract--The executed written agreement between the Department and an Administrator performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(18) Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(19) Council of Governments (COG)--A regional body which serves an area of several counties to address regional planning including but not limited to transportation planning, economic and community development, information gathering and processing, hazard mitigation and emergency preparedness, and water and environmental planning.

(20) Deobligated Funds--The funds released by an Administrator or Contractor or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and an Administrator or Development Owner.

(21) Department--The Texas Department of Housing and Community Affairs.

(22) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(23) Development--A Project that has a construction component, either in the form of New Construction or the Rehabilitation of multi-unit or single family residential housing that meet the affordability requirements.

(24) Development Funding--

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable development.

(25) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department.

(26) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and is to be under the Development Owner's Control.

(27) Executive Award and Review Advisory Committee ("The Committee")--The Department committee that will develop funding priorities and make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306, Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities.

(28) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors.

(29) General Partner--The partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(30) Grant--Financial assistance that is awarded in the form of money to a housing sponsor for a specific purpose and that is not required to be repaid. For purposes of this chapter, a Grant includes a forgivable loan.

(31) Household--One or more persons occupying a housing unit.

(32) Housing Development Costs--The total of all costs incurred, or to be incurred, by the Development Owner in acquiring, constructing, rehabilitating and financing a Development as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas.

(33) HUD--The United States Department of Housing and Urban Development, or its successor.

(34) Income Eligible Households--

(A) Low-Income Households--Households whose annual incomes do not exceed 80% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(B) Very Low-Income Households--Households whose annual incomes do not exceed 60% of the median family income for the area, as determined by HUD and published by the Department, with adjustments for family size.

(C) Extremely Low Income Households--Households whose annual incomes do not exceed 30% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(35) Intergenerational Housing--Housing that includes specific units that are restricted to the age requirements of a Qualified Elderly Development and specific units that are not age restricted in the same Development that:

(A) have separate and specific buildings exclusively for the age restricted units;

(B) have separate and specific leasing offices and leasing personnel exclusively for the age restricted units;

(C) have separate and specific entrances, and other appropriate security measures for the age restricted units;

(D) provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) share the same Development site;

(F) are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) meet the requirements of the federal Fair Housing Act.

(36) Land Use Restriction Agreement ("LURA")--An agreement between the Department and a Person related to a specific property, or properties, which is filed with the responsible recording authority.

(37) Loan--Financial assistance that is awarded in the form of money and in an executed agreement between the Department and Person for a specific purpose and this is required to be repaid.

(38) Material Noncompliance--As defined in Chapter 60, Subchapter A of this title.

(39) Manufactured Housing Unit (MHU)--As defined by HUD is a structure transportable in one or more sections which, in traveling mode, is 8 body-feet or more in width or 40 body-feet or more in length, or when erected on site, is 320 square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required facilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein.

(40) Memorandum of Understanding (MOU)--A written agreement detailing the understanding between the parties.

(41) Modular Housing--As defined by HUD is a home built in sections in a factory to meet state, local, or regional building codes. Once assembled, the modular unit becomes permanently fixed to one site.

(42) Mortgagor ("Borrower")--The Person who borrows money and uses his or her real property as collateral and security for the payment of the debt.

(43) New Construction--Any Development not meeting the definition of Rehabilitation or Reconstruction.

(44) NOFA--Notice of Funding Availability, published in the *Texas Register*.

(45) Nonprofit Organization--A public or private organization that:

(A) is organized under state or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(C) has a current tax exemption ruling from the Internal Revenue Service (IRS) under §501(c)(3), a charitable, nonprofit corporation, or §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the application and must continue to be effective throughout the length of any contract agreements; or classification as a subordinate of a central organization non-profit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and

(D) A private nonprofit organization's pending application for §501(c)(3) or (4) status cannot be used to comply with the tax status requirement.

(46) Open Application Cycle--A defined period during which applications may be submitted according to a published NOFA and which will be reviewed on a first come-first served basis until all funds available are committed, or until the NOFA is closed, whichever is earlier.

(47) Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(48) Persons with Disabilities--A Household composed of one or more persons, at least one of whom is a Person, who has a disability that is a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002).

(49) Person with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs:

(A) consistent with 42 USC §§12701 et seq. and as provided in the Consolidated Plan and may include any households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, elderly, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers, and public housing residents.

(B) Housing Trust Funds may also be awarded through Persons legally responsible for caring for a Person with Special Needs, pursuant to §2306.511, Texas Government Code.

(50) Predevelopment Costs--Reimbursable costs related to a specific eligible housing project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not

limited to consulting fees, architectural fees, engineering fees, engagement of a development team, site control, and title clearance;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(51) Principal--Any Person that does or will exercise Control over a partnership, corporation, limited liability company, trust or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(52) Principal Residence--The primary housing unit a Person or Household inhabits.

(53) Project--A site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or sites on which the building or buildings are located, that are under common ownership, management, and financing.

(54) Property--The real estate and all improvements thereon which are the subject of the Application whether currently existing or proposed to be built thereon in connection with the Application.

(55) Public Housing Authority--A housing authority established under the Texas Local Government Code, Chapter 392.

(56) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) is intended for, and solely occupied by, individuals 62 years of age or older; or

(B) is intended and operated for occupancy by at least one individual 55 years of age or older per unit, where at least 80% of the total housing units are occupied by at least one individual who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals 55 years of age or older.

(57) Received Date--The date and time at which an Application is actually received by the Department.

(58) Rehabilitation--The improvement or modification of an existing residential development through an alteration, addition, or enhancement. The term includes the demolition of an existing residential development and the reconstruction of any development units, but does not include the improvement or modification of an existing residential development for the purpose of an adaptive reuse of the development. Rehabilitation also includes replacing and existing substandard MHU with a new MHU.

(59) Resolution--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of Person or Persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate Bylaws.

(60) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for funding by the Texas Rural Development Office of the United States Department of Agriculture, other than an area that is located in a municipality with a population of more than 50,000.

(61) Rural Development--A development or proposed development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(62) Service Area--The city(ies), county(ies) and/or place(s) identified in the Contract that the Administrator will serve.

(63) TAC--Texas Administrative Code.

(64) Third Party--A Person who is not:

(A) an Applicant, General Partner, Developer, or General Contractor; or

(B) an Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor; or

(C) a Person(s) receiving any portion of the contractor fee or developer fee.

(65) Unit of General Local Government--A city, town, county, or other general purpose political subdivision of the State.

(66) Urban Area--The area that is located within the boundaries of a primary metropolitan statistical area other than an area described by §2306.004(28-a)(B), Texas Government Code, or eligible for funding as described by §2306.004(28-a)(C).

§51.3. Notice of Receipt of Application or Proposed Application.

(a) Not later than the 14th day after the date an Application or a proposed Application for housing funds described by §2306.111 has been filed, the Department shall provide written notice of the filing of the Application or proposed Application to the following Persons:

(1) the United States representative who represents the community containing the Development described in the Application;

(2) members of the legislature who represent the community containing the Development described in the Application;

(3) the presiding officer of the governing body of the political subdivision containing the Development described in the Application;

(4) any member of the governing body of a political subdivision who represents the area containing the Development described in the Application;

(5) the superintendent and the presiding officer of the board of trustees of the school district containing the Development described in the Application; and

(6) any neighborhood organizations on record with the state or county in which the Development described in the Application is to be located and whose boundaries contain the proposed development site.

(b) The notice provided under subsection (a) of this section must include the following information:

(1) the relevant dates affecting the Application, including:

(A) the date on which the Application was filed;

(B) the date or dates on which any hearings on the Application will be held; and

(C) the date by which a decision on the Application will be made;

(2) a summary of relevant facts associated with the development;

(3) a summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(4) the name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

§51.4. Loan Closing is Required Prior to Construction.

Administrators and Development Owners must not proceed or allow a contractor to proceed with construction, including demolition, on any Activity, Project or Development without first completing the Loan closing, if required, with the Department.

§51.5. Allocation of Housing Trust Funds.

(a) Pursuant to §2306.201, Texas Government Code, the Housing Trust Fund is a fund administered by the Department, and placed with the Texas Treasury Safekeeping Trust Company.

(b) Uses of the Housing Trust Fund will be limited to those defined by §2306.202, Texas Government Code.

(c) Each biennium the first $2.6 million available through the housing trust fund for loans, grants, or other comparable forms of assistance shall be set aside and made available exclusively for local units of government, public housing authorities, and nonprofit organizations. Any additional funds may also be made available to for-profit organizations so long as at least 45 percent of available funds in excess of the first $2.6 million shall be made available to nonprofit organizations. The remaining portion shall be competed for by nonprofit organizations, for-profit organizations, and other eligible entities, pursuant to §2306.202, Texas Government Code.

(d) Funds shall be allocated to achieve broad geographic dispersion by awarding funds in accordance with §2306.111(d) and (g), Texas Government Code.

(e) The Department shall require that Applicants target at least 50% of those units served by housing trust funds to individuals and families earning less than 60% of AMFI.

(f) Bond indenture requirements governing expenditure of bond proceeds deposited in the housing trust fund shall govern and prevail over all other allocation requirements established in this section. However, the Department shall distribute these funds in accordance with the requirements of this section to the extent possible.

(g) Housing Trust Funds may also be allocated to the Texas Bootstrap Loan Program and will be awarded in accordance with §2306.753, Texas Government Code.

§51.6. Basic Eligible Activities.

(a) Pursuant to §2306.202, Texas Government Code, the Department, through the housing finance division, shall use the housing trust fund to provide Loans, Grants, or other comparable forms of assistance to Units of General Local Government, Public Housing Authorities, for-profit entities, Nonprofit organizations, and Income-Eligible individuals, families, and Households to finance, acquire, Rehabilitate, and Develop decent, safe, and sanitary housing. In each biennium the first $2.6 million available through the housing trust fund for Loans, Grants, or other comparable forms of assistance shall be set aside and made available exclusively for Units of General Local Government, Public Housing Authorities, and Nonprofit organizations. Any additional funds may also be made available to for-profit organizations so long as at least forty-five percent (45%) of available funds in excess of the first $2.6 million shall be made available to Nonprofit organizations for the purpose of acquiring, Rehabilitating, and Developing decent, safe, and sanitary housing. The remaining portion shall be competed for by nonprofit organizations, for-profit organizations, and other eligible entities. Notwithstanding any other section of this chapter, but subject to the limitations in §2306.251(c), the Department may also use the fund to acquire property to endow the fund.

(b) Use of the fund is limited to providing:

(1) assistance for individuals and families of low and very low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low and very low income; and

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low and very low income.

(c) Pursuant to §2306.754, Applicants combining other Housing Trust Fund funding with the Texas Bootstrap Loan Program funds must limit total Department loans to $30,000.

§51.7. Prohibited Activities.

Department awards may not be used to:

(1) assist Persons who owe payments identified by the Comptroller of Texas as relevant;

(2) assist Households whose Property has current tax liens and/or judgments to the State of Texas against it; or

(3) provide Rehabilitation on a housing unit without prior written consent of all Persons who have a valid lien or ownership interest in the Property.

§51.8. Application Procedures and Requirements.

(a) Competitive and Open Application Cycles. All NOFAs will be presented to the Board. The Department will declare within a NOFA whether the application cycle will be a competitive or open cycle.

(b) Ex Parte Communications

(1) During the period beginning on the date Applications are filed in response to a NOFA and ending on the date the Board makes a final decision with respect to the approval of any Application for that NOFA, a member of the Board may not communicate with the following persons:

(A) an Applicant or a Related Party, as defined by state law, including board rules, and federal law; and

(B) any Person who is:

(i) active in the construction, Rehabilitation, ownership, or Control of the proposed Project, including:

(ii) a General Partner or Contractor; and

(iii) a Principal or Affiliate of a General Partner or Contractor; or

(iv) employed as a consultant, lobbyist, or attorney by an Applicant or a Related Party.

(2) Subject to paragraph (1) of this subsection, during the period beginning on the Applications are filed in response to a NOFA and ending on the date the Board makes a final decision with respect to the approval of any Application for that NOFA, an employee of the Department may communicate about the Application with the following Persons:

(A) the Applicant or a Related Party, as defined by state law, including board rules, and federal law; and

(B) any Person who is:

(i) active in the construction, rehabilitation, ownership, or control of the proposed project including:

(ii) a General Partner or Contractor; and

(iii) a Principal or Affiliate of a General Partner or contractor; or

(iv) employed as a consultant, lobbyist or attorney by the Applicant or a Related Party.

(3) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the internet, and must satisfy the following conditions:

(A) the communication must be restricted to technical or administrative matters directly affecting the Application;

(B) the communication must occur or be received on the premises of the Department during established business hours; and

(C) a record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(i) the date, time, and means of communication;

(ii) the names and position titles of the Persons involved in the communication and, if applicable, the Person's relationship to the Applicant;

(iii) the subject matter of the communication; and

(iv) a summary of any action taken as a result of the communication.

(4) Notwithstanding paragraph (1), (2) or (3) of this subsection, a Board member or Department employee may communicate without restriction with a Person listed in paragraph (1) or (2) of this subsection during any Board meeting or public hearing held with respect to the Application, but not during a recess or other nonrecord portion of the meeting or hearing.

(5) Paragraph (1) of this subsection does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(c) Eligible Applicants. The following organizations or entities are eligible to apply for Program Activities:

(1) Nonprofit organizations;

(2) Units of General Local Government;

(3) for-profit entities and sole proprietors; and

(4) Public Housing Agencies.

(d) Ineligible Applications, Activities, and Restrictions. The following conditions will cause an Applicant, and any applications they have submitted, to be ineligible:

(1) The Applicant, Development Owner, or Developer is an Administrator of a previously funded Contract for which Department funds have been partially or fully deobligated due to failure to meet contractual obligations during the 12 months prior to application submission date, unless the deobligation was voluntary and prior to the contract term expiration date, or was the remainder on a completed Contract.

(2) The Applicant, Development Owner, or Developer has failed to submit or is delinquent in a response to provide an explanation, evidence of corrective action or a payment of disallowed costs or fees as a result of a monitoring review.

(3) The Applicant, Development Owner, or Developer has failed to make timely payment or is delinquent on any loans or fee commitments made with the Department on the date of the Application submission.

(4) The Applicant, Development Owner, or Developer has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement of Non-procurement Programs or has otherwise been debarred by HUD or the Department.

(5) The Applicant, Development Owner, or Developer has violated the State's revolving door policy.

(6) The Applicant, Development Owner, or Developer has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline.

(7) The Applicant, Development Owner, or Developer at the time of Application submission is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD is subject to a federal tax lien; or is the subject of an enforcement proceeding with any governmental entity.

(8) The Applicant, Development Owner, or Developer with any past due audits has not submitted those past due audits to the Department in a satisfactory format on or before the Application submission date in accordance with §1.3 of this title.

(9) The submitted Application has an entire volume of the Application missing; has excessive omissions of documentation from the threshold Criteria or uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review can not reasonably be performed by the Department, as determined by the Department. If an Application is determined ineligible pursuant to this section, the Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibility will be included in the termination letter to the Applicant.

(10) The Applicant, Development Owner, or Developer or anyone that has Controlling ownership interest in the Development Owner or Developer that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA.

(11) The Application is a joint venture Application for the same Program Activity to serve the same town, city, or county that is identified in the Application already submitted as a sole Application for the same Program Activity in the same town, city or county.

(12) Any Application that includes financial participation by a Person who, during the five-year period preceding the date of the bid or award, has been convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricanes Rita or Katrina or any other disaster occurring after September 25, 2005, or was assessed a federal civil or administrative penalty in relation to such a contract.

(13) Applications which propose the refinancing or rehabilitation of properties constructed within the past 5 years and previously funded by the Department are not eligible.

(14) Displacement of Existing Affordable Housing. Housing Trust Funds shall not be utilized on a development that has the effect of permanently displacing low, very low, and extremely low income persons and families. Low-Income persons who may be temporarily displaced by the rehabilitation of affordable housing may be eligible for compensation of moving and relocation expenses. If a Housing Trust Fund recipient violates the dislocation provision of this paragraph, that recipient risks loss of Housing Trust Funds and the landlord/developer must pay the affected tenant's costs and all moving expenses.

(e) Noncompliance. Each Application will be reviewed for its compliance history by the Department, consistent with Chapter 60, Subchapter A of this title. Applications containing Persons found to be in Material Noncompliance or otherwise violating the compliance rules of the Department will be terminated.

(f) Application Form and Materials. The Department will develop and publish on its website an Application and ASPM that if completed would satisfy the requirements for requesting funds from the Department. The Department may limit the eligibility of Applications in the NOFA and ASPM. Threshold and selection criteria and any other Application requirements will be specified in the NOFA approved by the Board.

(g) General Application Requirements. Applicants must submit an Application by the deadline date specified in the NOFA using the Application and ASPM forms required by the Department. All Applications must be received during business hours (8:00 a.m. to 5:00 p.m. Central Standard Time) on any business day. Completion and submission of the Application includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (§2306.1111)

(h) Application Limitations. The Department reserves the right to reduce the amount requested in an Application based on activity or Project feasibility, underwriting analysis, or availability of funds.

§51.9. Single Family Housing Programs.

Eligible activities include the acquisition and/or New Construction or Rehabilitation of single family housing or rental subsidies, including security or utility deposits, and as further defined in the NOFA. Single family housing units assisted with HTF funds must comply with the required affordability requirements. In addition, housing that is Newly Constructed or Rehabilitated with HTF funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances. The NOFA will include any limitations to the maximum award amounts, the Contract terms, performance benchmarks, and cost limitations.

§51.10. Multifamily Development Application Requirements.

Rental Housing Development Site and Development Restrictions. Restrictions include all those items referred to in Chapter 2306, Texas Government Code and any additional items included in the NOFA for rental housing developments.

§51.11. Multifamily Development Applicants Requesting Additional Funding from Other Housing Finance Programs.

(a) If an Application is submitted to the Department for a Development that requests funds from two separate housing finance programs, one of which includes the Housing Trust Fund, and only one of the housing finance programs is operated as a Competitive Application Cycle, then the Application will be handled in accordance with the competitive cycle guidelines for that program. If an Application is submitted for two separate housing finance programs where both programs are either open cycle, or competitive, one of which is Housing Trust Fund, the Application will be handled in accordance with the most restrictive program rules with the approval of the Department's Executive Director. Threshold and any other rental requirements will be noted in any NOFA released.

(b) Applicants who are seeking tax credits and are also seeking funds under this chapter for the same Development must meet the requirements under the Qualified Allocation Plan for the year in which they are applying for these funds and all of the requirements of this chapter unless specifically waived by the Department.

§51.12. Application Review Process.

(a) Applications received by the Department in response to an Open Application Cycle NOFA will be handled in the following manner:

(1) The Department will accept Applications on an ongoing basis, until such date when the Department makes notice to the public that an Open Application Cycle has been closed.

(2) Each application will be handled on a first-come, first-served basis as further described in this section. Each application will be assigned a Received Date based on the date and time it is physically received by the Department. Then each application will be reviewed on its own merits in two review phases, as applicable. Applications will continue to be prioritized for funding based on its Received Date unless it does not proceed into the next phase(s) of review. Applications proceeding in a timely fashion through a phase will take priority over Applications that may have an earlier Received Date but that did not timely complete a phase of review.

(A) Phase One will begin as of the Received Date and will include a review of eligibility and threshold criteria and all Application requirements. The Department will ensure review of materials required under the NOFA and ASPM and will issue a notice of any Administrative Deficiencies. Applicants who are able to resolve their Administrative Deficiencies within five (5) business days will be forwarded into Phase Two, if applicable, and will continue to be prioritized by their Received Date. Applications with Administrative Deficiencies not cured within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase and do not require additional review in Phase Two, will be reviewed for recommendation to the Board by the Committee.

(B) Phase Two will include a comprehensive review for financial feasibility for Development Activities. Financial feasibility reviews will be conducted by the Real Estate Analysis (REA) Division consistent with §1.32 of this title. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. The Department may issue a notice of any Administrative Deficiencies. Applications with Administrative Deficiencies not satisfied within five (5)

business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase will be reviewed for recommendation to the Board by the Committee.

(3) Because Applications are processed in the order they are received by the Department it is possible that the Department will expend all available Housing Trust Fund funds before an application has completed all phases of review. In the case that all Housing Trust Fund funds are committed before an application has completed all phases of the review process, the Department will notify the applicant that their application will remain active for ninety (90) days in its current phase. If new Housing Trust Fund funds become available, Applications will continue onward with their review without losing their Received Date priority. If Housing Trust Fund funds do not become available within ninety (90) days of the notification, the Applicant will be notified that their Application is no longer under consideration. The applicant must reapply to be considered for future funding. If on the date an Application is received by the Department, no funds are available under the NOFA, the applicant will be notified that no funds remain under the NOFA and that the application will not be processed.

(b) Applications received by the Department in response to a Competitive Application Cycle NOFA for housing development activities will be handled in the following manner:

(1) The Department will accept Applications on an ongoing basis during the Application Acceptance Period as specified in the NOFA.

(2) Applications submitted and accepted by the Department will be reviewed for eligibility, threshold and selection criteria and all Application requirements. The Department will ensure review of materials required under the NOFA and ASPM. A comprehensive review of financial feasibility for Development activities will be conducted by the Real Estate Analysis (REA) Division consistent with §1.32 of this title for all competitive applications. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. The Department will issue a notice of any Administrative Deficiencies for items reviewed. If Administrative Deficiencies are not cured to the satisfaction of the Department within five (5) business days of the deficiency notice date, then five (5) points shall be deducted from the selection score for each additional day the Administrative Deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected within seven (7) business days from the deficiency notice date, then the Application shall be terminated.

(3) Upon completion of review and no unresolved Administrative Deficiencies, the Application will be reviewed for recommendation to the Board by the Committee.

(c) Administrative Deficiencies. If an application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies including threshold and/or selection criteria documentation and/or financial feasibility analysis. The Department staff may request clarification or correction in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. An Applicant may not change or supplement any part of an Application in any manner after submission to the Department, increase their award amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Real Estate Analysis Division to remedy an Administrative Deficiency as further described in this title or by amendment of an Application after a commitment or allocation of Housing Trust Fund monies.

(d) The Department may decline to fund any Application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Applications which are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department reserves the right to negotiate individual elements of any Application.

(e) A site visit will be conducted. Applicants must receive recommendation for approval from the Department to be considered for funding by the Board.

(f) Applicants may appeal staff's decisions regarding their applications consistent with §1.7 of this title.

(g) Alternative Dispute Resolution Policy. Applicants may utilize the Department's Alternative Dispute Resolution process as defined by §1.17 of this title.

§51.13. Criteria for Funding.

(a) In considering applications for funding, the Department considers the following requirements under §2306.203, Texas Government Code, and such others as may be enumerated during the funding cycle:

(1) Minimum Eligibility Criteria. To be considered for funding, an Applicant must first demonstrate that it meets each of the following threshold criteria:

(A) the Application is consistent with the requirements established in this rule and the NOFA;

(B) the Applicant provides evidence of its ability to carry out the proposal in the areas of financing, acquiring, Rehabilitating, Developing or managing an affordable housing Development;

(C) the proposal addresses and identifies a housing need. This assessment will be based on statistical data, surveys and other indicators of need as appropriate; and

(D) any outstanding Housing Trust Fund Pre-Development loans for the same proposed Development Site must be paid in full at the time of Loan closing for the current requested funds.

(2) Evaluation Factors. Pursuant to §2306.203(c), Texas Government Code, the criteria used to evaluate applications, as more fully reflected in the NOFA, will include at a minimum the:

(A) leveraging of federal funds including the extent to which the project will leverage State funds with other resources, including federal resources, and private sector funds;

(B) cost-effectiveness of a proposed development; and

(C) extent to which individuals and families of very low income and extremely low income are served by the development.

(b) The Board has final approval on all recommendations for funding.

(c) Eligible Applicants that have been approved for funding and that require a material change in the project description must provide a written request for the material change to the Department prior to implementing the change.

(1) A material change may include, but is not limited to, the following:

(A) Change in project site;

(B) Change in the number of units or set asides; and

(C) An increase in funding that is not permitted under §51.18 of this chapter.

(2) Failure to comply with this subsection may result in the termination of funding to Applicant.

§51.14. Process for Awards.

(a) All recommendations for awards will be presented to the Committee before presentation to the Board. All Applications must comply with all applicable program requirements or regulations.

(b) Applicants applying in response to an Open Application Cycle will be prioritized for recommendation to the Board based on the process described in §51.12 of this chapter and as otherwise specified in the NOFA.

(c) Applicants applying in response to a Competitive Application Cycle will be ranked by highest score per Uniform State Service Region per Area Type unless otherwise specified in the NOFA.

(d) In event of a tie between two or more Applicants, the Department reserves the right to determine which Application will receive a recommendation for funding. This decision will be based on housing need factors and feasibility of the proposed Project identified in the Application. Tied Applicants may also receive a partial recommendation for funding.

(e) If sufficient qualified Applications are not received for a Uniform State Service Region or Area Type, the funds will be redirected to the next Uniform State Service Region that had a higher number of qualified Applicants unless otherwise specified in the NOFA.

(f) Applicants may also receive a partial recommendation for funding. A minimum award amount may be established to ensure feasibility.

(g) When the remainder of the allocation within a Uniform State Service Region is insufficient to completely fund the next ranked Application in the Uniform State Service Region, it is within the discretion of the Department to:

(1) fund the next ranked application for the partial amount, reducing the scope of the Application proportionally;

(2) make necessary adjustments to fully fund the Application; or

(3) transfer the remaining funds to another Uniform State Service Region.

(h) Applications receiving a favorable staff recommendation are presented to the Board for approval, pending the availability of Housing Trust Fund funds.

(i) Applicants may appeal staff's decision regarding their Applications in accordance with §1.7 of this title.

(j) Even after Board approval of the award of any Housing Trust Fund funds, acquisition or construction activities will be conditional upon a completed Loan closing, if required, and any other conditions deemed necessary by the Department.

§51.15. Contract Required after Award.

Any activity funded under this program will be governed by a written Contract that identifies the terms and conditions related to the awarded funds. The Contract will not be effective until executed by all parties to the Contract. Any amendments must be in writing and are subject to the requirements of this chapter.

§51.16. Documents Supporting Mortgage Loans.

(a) A mortgage Loan shall be evidenced by a mortgage or deed of trust note or bond and by a mortgage that creates a lien on the housing development and on all real property that constitutes the site of or that relates to the housing development.

(b) A note or bond and a mortgage or deed of trust:

(1) must contain provisions satisfactory to the Department;

(2) must be in a form satisfactory to the Department; and

(3) may contain exculpatory provisions relieving the Borrower or its Principal from personal liability if the Department agrees.

(c) For each Loan made for the Development of multifamily housing with Housing Trust Fund funds provided to the State, the Department shall obtain a mortgagee's title policy in the amount of the loan. The Department may not designate a specific title insurance company to provide the mortgagee title policy or require the borrower to provide the policy from a specific title insurance company. The borrower shall select the title insurance company to close the Loan and to provide the mortgagee title policy.

(d) For each Loan made for the acquisition, New Construction, and/or Rehabilitation of single family housing with Housing Trust Fund funds provided to the State, the Department shall specify the requirements in the associated program manual and/or NOFA. This may include, but not be limited to any title documents, appraisals, property tax status, surveys or life event documentation.

(e) For Loans that provide downpayment, gap financing and/or closing cost assistance, the Administrator or Development Owner must submit to the Department the original recorded deed of trust and transfer of lien, if applicable. Failure to submit these documents within ninety (90) days after the Loan closing date may result in the Department withholding payment for disbursement requests.

§51.17. Amendments.

(a) Amendment requests to be approved by the Executive Director are allowable under the following circumstances:

(1) Time extensions. The Executive Director may collectively provide up to one six month extension to the end date of any Contract. Any additional time extension granted by the Executive Director shall include a statement by the Executive Director relating to unusual, non foreseeable or extenuating circumstances. If the extension is longer than six months and the Executive Director determines that a statement related to unusual, non-foreseeable, or extenuating circumstances cannot be issued, it will be presented to the Governing Board for approval, approval with modifications, or denial of the requested extension;

(2) Changes in Area Median Family Income (AMFI) levels. The Executive Director may grant approval of a modification or amendment to the AMFI levels of the households to be served under said contract, if Contract Administrator provides a statement relating to unusual, non-foreseeable or extenuating circumstances that warrant such a request to be granted and the Executive Director determines that such request does not violate Department rules. In the case that the Executive Director determines that such request is not warranted and/or violates Department rules, the request will be presented to the Board for approval;

(3) Changes to Services Area. The Executive Director may grant approval of the modification or amendment to the Service Area being served under said contract, if Contract Administrator provides a statement relating to unusual, non-foreseeable or extenuating circumstances that warrant such a request to be granted and the Executive

Director determines that does not violate Department rules. In the case that the Executive Director determines that such request is not warranted and/or violates Department rules, the request will be presented to the Board for approval;

(4) Changes in number of Households to serve. The Executive Director may grant approval of the modification or amendment to the reduction in the number of the Households to be served under said Contract, if Contract Administrator provides a statement relating to unusual, non-foreseeable or extenuating circumstances that warrant such request to be granted and the Executive Director determines that such request does not violate Department rules. In the case the Executive Director determines that such request is not warranted and/or violates Department rules, the request will be presented to the Board for approval; or

(5) Increase in funds. In the case of a modification or amendment to the dollar amount of the award, such modification or amendment does not increase the dollar amount by more than 25% of the original award or $50,000, whichever is greater. Modifications and/or amendments that increase the dollar amount by more than 25% of the original award or $50,000, whichever is greater; or significantly decrease the benefits to be received by the Department, in the estimation of the Executive Director, will be presented to the Board for approval.

(b) If the Administrator or Development Owner fails to meet a benchmark requirement and does not seek, or is not granted, an extension of a benchmark, the awarded funds related to the lack of performance may be entirely or partially deobligated at the Department's sole discretion.

(c) Additional Funds. In the event the Department receives additional funds, the Department, with Board approval, may elect to distribute funds to other Administrators or Development Owners.

(d) Accounting Requirements. Within sixty (60) days following the conclusion of a contract issued by the Department the recipient shall provide a full accounting of funds expended under the terms of the contract. Failure of a recipient to provide full accounting of funds expended under the terms of a contract shall be sufficient reason to terminate the contract and for the Department to deny any future contract to the recipient.

(e) Individual benchmarks. Each benchmark is an individual term and subject to the amendment processes. An interim milestone extension may or may not extend the entire Contract at the Department's discretion.

§51.18. General Contract Administration.

All Administrators and Development Owners must use the forms provided on the Department's website and comply with the Department's procedural and documentation requirements as outlined in the Program Manual and in this section including:

(1) Contract must be signed and executed by all appropriate authorized parties.

(2) Attend training as required by the Department.

(3) Develop and comply with written procurement selection criteria and committees.

(4) Procure consultants, if applicable. Consultants may not participate in or direct any part of the process for procuring consultants.

(5) Complete all applicable Department Contract System access request forms and requirements.

(6) Perform Loan closing, if required, prior to performing any construction activities, including demolition.

(7) Develop and comply with written accounting, reporting, filing, and documentation procedures.

(8) Develop and comply with written applicant intake and selection criteria and ensure program eligibility which must include, but is not limited to:

(A) Homeownership, if applicable;

(B) Income eligibility;

(C) Assisted Households must be located within the Administrator's Service Area, as defined by the Contract;

(D) Property taxes are current, if applicable; and

(E) Assist Special Needs Households, if applicable.

(9) Develop and comply with affirmative marketing procedures.

(10) Complete applicant intake and applicant selection. Notify each applicant Household in writing of either acceptance or denial of assistance within sixty (60) days following receipt of the intake application.

(11) To ensure compliance with the Texas Comptroller of Public Accounts requirements, Contract Administrators are required to ensure the applicant Household does not owe a debt to the State of Texas including tax liens, child support liens, or student loan delinquencies.

(12) Ensure that no Conflict of Interest exists between Households to be assisted and Persons designated to receive or assist with the application intake process.

(13) Document and verify all income and asset eligibility requirements for the Household to be assisted.

(14) Ensure compliance with applicable audit certification requirements.

(15) Ensure that the demolition and removal of all dilapidated units on the lot occurs prior to the Household's occupancy of the Newly Constructed or Rehabilitated housing unit.

(16) Ensure and verify that each building construction contractor performing activities in the amount of $10,000 or more under the Contract is registered and maintains good standing with the Texas Residential Construction Commission.

(17) Ensure and verify that each housing unit being rehabilitated in the amount of $10,000 or more under the Contract is registered with the Texas Residential Construction Commission.

(18) Provide building construction contractor oversight and ensure builder's risk coverage is provided.

(19) Ensure that the demolition of any housing unit does not occur less than six (6) months prior to the Contract end date.

(20) Ensure compliance with applicable construction or property standards and lead-based paint requirements.

(21) Conduct appropriate property inspections and documentation in accordance with applicable program requirements.

(22) Submit required documentation and electronic requests for Project setups and disbursement requests to the Department.

(23) Submit support documentation for Project setups and disbursement requests within thirty (30) days of electronic submission to the Department.

(24) Submit all Project setups and support documentation for Households to be assisted no later than ninety (90) days prior to the Contract end date. In the event that a loan closing is required for single family Rehabilitation or Reconstruction, non-development activities, all Project setups and support documentation must be submitted no later than one hundred eighty (180) days prior to the Contract end date.

(25) Submit required documentation for Project completion reports and certificate of Contract Completion no later than sixty (60) days from the Contract end date.

(26) Complete the terms of the Contract.

§51.19. Other Program Requirements.

(a) Employment opportunities. In connection with the planning and carrying out of any project assisted under the Act, to the greatest extent feasible, opportunities for training and employment shall be given to low, very low, and extremely low-income persons who meet position requirements residing within the area in which the project is located.

(b) Conflict of Interest.

(1) Conflict Prohibited. No person described in paragraph (2) of this subsection who exercises or has exercised any functions or responsibilities with respect to Housing Trust Fund activities under the Statute or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from a Housing Trust Fund assisted activity, or have an interest in any Housing Trust Fund contract, subcontract or agreement or the proceeds hereunder, either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter.

(2) Persons Covered. The conflict of interest provisions of paragraph (1) of this subsection apply to any person who is an employee, agent, consultant, officer, elected official or appointed official of the Administrator or Development Owner.

(c) Grant funds management and procurement. Except as specifically modified by law or the provision of this Chapter, Contract Administrator or Development Owner must comply with the rules promulgated by the Office of the Governor under the Uniform Grant Management Act (Texas Government Code, Chapter 783 and 1 TAC Chapter 5) to administer the Housing Trust Fund. Contract Administrator or Development Owner must comply with all applicable state, and local laws, regulations, and ordinances for making procurements with Housing Trust Fund monies. Contract Administrator or Development Owner must ensure compliance with the requirements of the Texas Government Code, Chapter 2254.

(d) Right to Inspect and Monitor.

(1) The Department may, at any time, inspect and monitor the records and the work of the Project so as to ascertain the level of Project completion, quality of work performed, inventory levels of stored material, compliance with the approval plans and specifications, property standards, and program rules and requirements.

(2) Any unsatisfactory findings in the inspection may result in a reduction in the amount of funds requested or termination of funding.

(3) Within 45 days of completion of any construction, and before the release of any retainage funds, Administrators and Development Owners are required to notify the Department of the completion by submitting a certificate of completion and any other documents required by program guidelines, including, but not limited to, the following:

(A) Architect's Certification of Substantial Compliance;

(B) Administrator or Development Owner's Certificate of Substantial Completion; and

(C) Administrator or Development Owner's and Supplier's Release of Lien and warrantee.

(4) The Department performs a final close-out visit and assists owners in preparing for long-term compliance requirements upon completion of project development.

(e) Compliance.

(1) Recipient must maintain compliance with each of its Contracts with the Department.

(2) Restrictions are stated and enforced through a regulatory agreement.

(3) These restrictions include, but are not limited to the following:

(A) Rent restrictions;

(B) Record keeping and reporting; and

(C) Income targeting of tenants.

(4) The Department monitors compliance with project restrictions and any other covenants by Recipient in any Housing Trust Fund agreement. An annual per unit compliance fee of $25.00 may be charged for this review.

(f) For funds being used for multifamily rental properties, the Recipient must establish a reserve account consistent with §2306.186, Texas Government Code, and as further described in §1.37 of this title.

§51.20. Citizen Participation.

(a) The Department holds at least one public hearing annually, and additional public hearings prior to consideration of any proposed significant changes to these rules, to solicit comments from the public, eligible applicants, and Administrators and Development Owner on the Department's rules, guidelines, and procedures for the Housing Trust Fund.

(b) The Department considers the comments it receives at public hearings. The Board annually reviews the performance, administration, and implementation of the Housing Trust Fund in light of the comments it receives. The Board also reviews funding goals and set-asides relating to Allocation of Housing Trust Funds.

(c) Unless the request is made during a Competitive Application Cycle, Applications for Housing Trust Funds are public information and the Department shall afford the public an opportunity to comment on proposed housing applications prior to making awards.

(d) Complaints will be handled in accordance with the Department's complaint procedures of §1.2 of this title.

§51.21. Records to be Maintained.

(a) Administrator or Development Owners are required, at least on an annual basis, to submit to the Department information required under Chapter 1 of this title, which may include, but is not limited to:

(1) such information as may be necessary to determine whether a project is benefiting low, very low, and extremely low-income persons and families;

(2) the monthly rent or mortgage payment for each dwelling unit in each structure assisted;

(3) such information as may be necessary to determine whether Administrators and Development Owners has carried out their housing activities in accordance with the requirements and primary objectives of the Housing Trust Fund and implementing regulations;

(4) the size and income of the household for each unit occupied by a low, very low, or extremely low-income person or family;

(5) data on the extent to which each racial and ethnic group and households have applied for and benefited from any project or activity funded in whole or in part with funds made available under Texas Government Code, Chapter 2306. This data shall be updated annually; and

(6) a final statement of accounting upon completion of the Project.

(b) Administrator or Development Owners shall maintain records pertinent to the tenant's files for a period of at least three years.

(c) Administrator or Development Owners shall maintain records pertinent to funding awards including but not limited to project costs and certification work papers for a period of at least five years.

(d) Administrator or Development Owners shall maintain records in an accessible location.

§51.22. Waiver.

The Board may, in its discretion, waive any one or more of the rules set forth in this chapter to accomplish its legislative mandates or for other compelling circumstances.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804870
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 53. HOME PROGRAM RULE
SUBCHAPTER A. GENERAL

10 TAC §53.2

The Texas Department of Housing and Community Affairs (Department) proposes amendments to 10 TAC Chapter 53, Subchapter A, §53.2, concerning Definitions. The proposed amendments make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The amended section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The amended section affects no other code, article or statute.

§53.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (15) (No change.)

(16) Bylaws--A rule or administrative provision adopted by a corporation for its internal governance. Bylaws are enacted apart from the Articles of Incorporation. Bylaws and amendments to Bylaws must be formally adopted in the manner prescribed by [~~the organization's Articles of Incorporation or~~] current Bylaws by either the organization's board of directors or the organization's members, whoever has the authority to adopt and amend Bylaws.

(17) - (20) (No change.)

[~~(21) Colonia Housing Standards--The Department's HUD approved housing standards that allow Colonia residents the opportunity to rehabilitate their homes when located in a designated Colonia.~~]

(21) [~~(22)~~] Community--Urban areas means one or several Neighborhoods, a city, a county, or a metropolitan area and for Rural Areas means one or several Neighborhoods, a town, a village, a county or multi-county area, but not the whole state. For purposes of this Chapter, the Applicant should clearly define the area. For example, the city of Dallas would not include all of Dallas and Collin counties but Dallas and Collin counties would include the city of Dallas.

(22) [~~(23)~~] Community Housing Development Organization (CHDO)--A private nonprofit, community-based service organization that has obtained or intends to obtain staff with the capacity to develop affordable housing for the community it serves in accordance with 24 CFR §92.2 and which is certified as such by the Department. To be certified as a CHDO by the Department, the organization must act in the capacity of Developer, Owner or Sponsor as defined in this chapter.

(23) [~~(24)~~] Community Housing Development Organization (CHDO) Developer--The CHDO:

(A) Either owns a Property and develops a Project, or has a contractual obligation to a property owner to develop a Project; and

(B) Performs all the functions typically expected of for-profit Developers, and assumes all the risks and rewards associated with being the Project Developer.

(i) For RHD, the CHDO must obtain financing, and Rehabilitate, Reconstruct or construct the Project. If it owns the Property, the CHDO may maintain ownership and manage the Project over the long term. If it does not own the Property, the CHDO must enter into a contractual obligation with the property owner. This contractual obligation is independent of the PJ.

(ii) For HBA, the CHDO must obtain Project financing, Rehabilitate, Reconstruct or construct the dwelling(s), and have title of the property and the HOME loan/grant obligations transferred to a HOME-qualified homebuyer within a specified timeframe. If it does not own the Property, the CHDO must enter into a contractual obligation with the property owner. This contractual obligation is independent of the PJ.

(24) [~~(25)~~] Community Housing Development Organization (CHDO) Owner--The CHDO holds valid legal title to or has a long-term (99-year minimum) leasehold interest in a rental Property. The CHDO may be a Development Owner with one or more Persons. If it owns the Project in partnership, it or its wholly-owned nonprofit or for-profit subsidiary must be the managing General Partner with effective control (i.e., decision-making authority) of the Project. The CHDO may be both Development Owner and Developer, or may have another entity as the Developer.

(25) [~~(26)~~] Community Housing Development Organization (CHDO) Sponsor--The CHDO:

(A) For RHD, the CHDO may develop a Project that it solely or partially owns and agrees to convey ownership to a second non-profit organization at a predetermined time prior to or during Development or upon completion of the Development of the Project. The HOME funds are invested in the Project owned by the CHDO. The CHDO Sponsor selects prior to commitment of HOME funds the non-profit organization that will obtain ownership of the Property. The non-profit assumes from the CHDO the HOME obligation (including any repayment of loans) for the Project at a specified time. If the Property is not transferred to the non-profit organization, the CHDO Sponsor remains liable for the HOME loan/grant obligation. The non-profit organization must be financially and legally separate from the CHDO Sponsor. The CHDO Sponsor must provide sufficient resources to the non-profit organization to ensure the Development and long-term operation of the Project.

(B) For HBA, the CHDO owns a Property, then shifts responsibility for the Project to another nonprofit at some specified time in the Development process. The second nonprofit, in turn, transfers title along with the HOME loan/grant obligations and recapture requirements to an Income Eligible Household within a specified timeframe. The HOME funds are invested in the Property owned by the CHDO. The other nonprofit being sponsored by the CHDO acquires the completed units, or brings to completion the Rehabilitation or construction of the Property. At completion of the Rehabilitation or construction, the second nonprofit is required to sell the Property along with the HOME loan/grant obligations to an Income Eligible Household.

(C) For either type of sponsorship, the CHDO must own the Property prior to the development phase of the project.

(26) [~~(27)~~] Community Housing Development Organization Pre-Development Loan--A form of assistance in which funds are made available as loans to cover those costs outlined in 24 CFR §92.301.

(27) [~~(28)~~] Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published Notice of Funding Availability (NOFA) that will include a submission deadline and selection or scoring criteria. Applications will be reviewed in accordance with the rules for application review published in the NOFA and the ASPM.

(28) [~~(29)~~] Conflict of Interest--A conflict between the private interests and the official responsibilities of a Person in a position of trust, as specified in 24 CFR §92.356.

(29) [~~(30)~~] Consolidated Plan--The State Consolidated Plan prepared in accordance with 24 CFR, Part 91, which describes the needs, resources, priorities and proposed activities to be undertaken with respect to certain HUD programs and is subject to approval annually by HUD.

(30) [~~(31)~~] Contract--The executed written agreement between the Department and an Administrator or Development Owner performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(31) [~~(32)~~] Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(32) Council of Governments (COG)--A regional body which serves an area of several counties to address regional planning including but not limited to transportation planning, economic and community development, information gathering and processing, hazard mitigation and emergency preparedness, and water and environmental planning.

(33) - (52) (No change.)

(53) HUD's Maximum Per-unit Subsidy Amount ("§221(d)(3) Limits [~~limits~~]")--The per-unit dollar limitations established under §221(d)(3)(ii) of the National Housing Act for elevator-type projects that apply to the area in which the housing is located.

(54) (No change.)

(55) Income Eligible Households--The federal definition which is:

(A) Low-Income Households--Households whose Annual Incomes do not exceed 80% of the AMFI;[~~,~~]

(B) Very Low-Income Households--Households whose Annual Incomes do not exceed 50% of the AMFI; and[~~,~~]

(C) (No change.)

(56) (No change.)

(57) Land Use Restriction Agreement (LURA)--An agreement between the Department and a Person related to a specific Property or Properties which is [~~binding upon a Person's successors in interest,~~] filed with the responsible recording authority[~~, and encumbers the Property with respect to requirements in this Chapter, Chapter 2306 of the Texas Government Code and the Final Rule~~].

(58) - (60) (No change.)

(61) Material Noncompliance--As [~~as is~~] defined in [~~10 TAC,~~] Chapter 60, Subchapter A of this title.

(62) - (66) (No change.)

(67) Nonprofit organization--A public or private organization that:

(A) - (C) (No change.)

(D) A private nonprofit organization's pending application to the IRS for exemption status under §501(c)(3) or [~~(c)~~](4) status cannot be used to comply with the tax status requirement.

(68) Open Application Cycle--A defined period of time during which Applications may be submitted according to a published NOFA and which will be reviewed on a first-come, first-served basis until all funds available are committed, or until the NOFA is closed, whichever is earlier.

(69) - (72) (No change.)

(73) Persons with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs consistent with 42 USC §§12701, et seq. and as provided in the Consolidated Plan and may include any households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, elderly, victims of domestic violence, persons with HIV/AIDS, homeless populations, [~~and~~] migrant farm workers, and public housing residents.

(74) Predevelopment Costs--Costs related to a specific eligible Project including:

(A) (No change.)

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining firm construction loan commitments, architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) (No change.)

(75) - (87) (No change.)

(88) Service Area--The city(ies), county(ies) and/or place(s) identified in the Contract that the Administrator will serve.

(89) - (91) (No change.)

(92) Subprime Mortgage Loan--A mortgage loan that is made at a higher interest rate than the prime rate offered by conventional lenders to a Person with higher credit risk characteristics or other underwriting deficiencies.

(93) [~~(92)~~] Subrecipient--A public agency or nonprofit organization selected by the Department to administer all or a portion of the Department's HOME program. A public agency or nonprofit that receives HOME funds solely as a developer or owner of housing is not a Subrecipient. The Department's selection of a Subrecipient is not subject to the procurement procedures and requirements.

(94) [~~(93)~~] TAC--Texas Administrative Code.

(95) [~~(94)~~] Tenant-Based Rental Assistance (TBRA)--A Program Activity for the purpose of providing HOME funds for rental subsidy and security and utility deposit assistance to Income Eligible Households.

(96) [~~(95)~~] Texas Minimum Construction Standard (TMCS)--The program standard used to determine the minimum acceptable housing condition for the purposes of Rehabilitation, New Construction, and acquisition.

(97) [~~(96)~~] Third Party--A Person who is not:

(A) An Applicant, Administrator, Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(B) An Affiliate, Affiliated Party to the Applicant, Administrator, Borrower, General Partner, Developer, Development Owner or General Contractor; or

(C) A Person receiving any portion of the administration, contractor fee or developer fee.

(98) [~~(97)~~] Unit of General Local Government--A city, town, county, or other general purpose political subdivision of the State; a consortium of such subdivisions recognized by HUD in accordance with 24 CFR §92.101 and any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction. An urban county is considered a unit of general local government under the HOME Program.

(99) [~~(98)~~] Urban Area--The area that is located within the boundaries of a primary metropolitan statistical area other than an area that is described by paragraph (86) of this section.

(100) [~~(99)~~] USC--The United States Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804827
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER B. ALLOCATION OF FUNDS

10 TAC §53.21

The Texas Department of Housing and Community Affairs (Department) proposes amendments to 10 TAC Chapter 53, Subchapter B, §53.21, concerning Allocation of Funds. The proposed amendments make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no effect on small businesses or persons. There is no an-

ticipated economic cost to persons who are required to comply with the amended section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The amended section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The amended section affects no other code, article or statute.

§53.21. Allocation of Funds.

(a) The Department shall administer all federal housing funds provided to the state under the Act in accordance with the Final Rule and Chapter 2306 of the Texas Government Code by:

(1) (No change.)

(2) expending 95% of these funds for the benefit of non-participating small cities and Rural Areas that do not qualify to receive funds under the Act directly from HUD; and

(3) (No change.)

(b) - (f) (No change.)

(g) Deobligated Funds. The Department shall use Deobligated Funds in accordance with §1.19 of this title. As required by Chapter 2306, the deobligated funds will be expended under the same allocation method called for under subsection (a)(2) of this section and are not subject to the regional allocation formula.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER C. PROGRAM ACTIVITIES

10 TAC §§53.30 - 53.37

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (Department) proposes the repeal of 10 TAC Chapter 53, Subchapter C, §§53.30 - 53.37, concerning the HOME Program Rule's Program Activities. The repeal is proposed in order to allow public comment and adoption of new rules governing the HOME Program, and to coordinate the adoption of new HOME rules with new rules being adopted as part of the 2009 rule cycle.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§53.30. Activities in Consolidated Plan.

§53.31. Owner-Occupied Housing Assistance Program (OCC).

§53.32. Homebuyer Assistance Program (HBA).

§53.33. Tenant-Based Rental Assistance Program (TBRA).

§53.34. Rental Housing Development Program (RHD).

§53.35. Single Family Housing Development Program.

§53.36. CHDO Pre-Development Loan Program.

§53.37. Prohibited Activities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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10 TAC §§53.30 - 53.37

The Texas Department of Housing and Community Affairs proposes new Chapter 53, Subchapter C, §§53.30 - 53.37. The

proposed new sections make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§53.30. Activities in Consolidated Plan.

Through its Consolidated Plan, the Department has identified general guidelines for funding of a Program Activity. Applicants that meet the qualifications identified in this chapter and under the terms of a NOFA may apply for any Program Activity the Department funds.

§53.31. Owner-Occupied Housing Assistance Program (OCC).

(a) Eligible activities are limited to the Rehabilitation or Reconstruction of existing owner-occupied housing. The Rehabilitation of an MHU is not an eligible activity.

(b) Eligible forms of homeownership are limited to fee simple title to the real property, a 99-year leasehold interest in the real property, a 50-year leasehold interest on trust, a 50-year leasehold on restricted Indian lands, or ownership or membership in cooperative or a mutual housing project that constitutes homeownership under Texas law.

(c) Eligible property types are limited to single family dwellings, condominium units and cooperative units in mutual housing projects. An MHU is not an eligible property type for Rehabilitation. HOME funds may be used to replace (Reconstruct) an owner-occupied housing unit with a new MHU or Modular Home if:

(1) the unit complies with standards at 24 CFR §92.205 and with the Texas Manufactured Housing Standards Act;

(2) the unit is permanently installed;

(3) the unit is permanently attached to utilities; and

(4) the ownership of the unit is recorded in the taxing authority of the county in which it is located.

(d) The Household must comply with the following initial eligibility requirements:

(1) own and occupy the single family unit as its Principal Residence;

(2) be an Income Eligible Household;

(3) be located within the Administrator's Service Area; and

(4) meet all other eligibility requirements.

(e) Real property taxes assessed on the housing unit must be current and/or the Household must be participating in an approved payment plan with the taxing authority.

(f) The property must not be encumbered with tax liens, child support liens, or mechanic or materialmen's liens.

(g) The maximum amount of assistance (including soft costs), unless otherwise specified in the NOFA, to an eligible Household is based on Household size:

(1) Rehabilitation that is Reconstruction for 1 to 4 person Household: $65,000;

(2) Rehabilitation that is Reconstruction for 5 to 6 person Household: $72,500;

(3) Rehabilitation that is Reconstruction for 7 or more person Household: $80,000; and

(4) Rehabilitation that is not Reconstruction: $30,000.

(h) The minimum amount of assistance to an eligible household is $1,000.

(i) The estimated value of the housing unit, after Rehabilitation or Reconstruction, must not exceed the HUD §203(b) Limits.

(j) The form of assistance to an eligible Household is based on AMFI except in the instances of an MHU being replaced with newly constructed housing (site-built) on the same site or any housing unit being replaced on an alternate site. In accordance with the Housing Assistance Rider of the Department's Legislative Appropriation, the Department shall use the state average median family income in determining the form of assistance as prescribed in Figure: 10 TAC §53.31(j) for eligible Households living in those counties where the area median family income is lower than the state average median family income. For Rehabilitation (excluding Homebuyer Assistance and contract for deed conversion), the Loan amount is based upon the amount of assistance to be provided to the household. Once construction is complete, the loan balance will be determined by subtracting soft costs and/or costs of lead-based paint remediation. The Department will adjust the Loan balance with a principal reduction in the amount necessary to arrive at the correct Loan balance, taking into account any change orders that resulted in a net decrease or increase in the amount of assistance. Any loan that has not closed at the time this chapter is adopted will follow the provisions in this subsection.
Figure: 10 TAC §53.31(j)

(k) When an MHU is being replaced with newly constructed housing (site-built) or any housing unit being replaced on an alternate site, the activity is considered acquisition and will trigger affordability requirements for homeownership as defined by 24 CFR §92.254. (Refer to §53. 32(l) of this subchapter).

(l) In the event that the housing unit ceases to be the Principal Residence of the Household, the Department has established that the

federal recapture requirements as defined in 24 CFR §92.254 will be imposed.

(m) In the event that the housing unit ceases to be the Principal Residence of the Household, the forgiveness of the Loan, if applicable, will cease, unless the Property is transferred by devise, descent or operation of law upon the death of the homeowner that is a Household whose Annual Income does not exceed 30% of the AMFI. The Department shall use the state average median family income for eligible Households living in those counties where the area median family income is lower than the state average median family income, as defined in the Housing Assistance Rider of the Department's Legislative Appropriation, to apply this subsection. Any Contract that is active at the time this chapter is adopted will follow the provisions in this subsection.

(n) In the event that the housing unit is sold, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and the housing unit must be sold for an amount not less than the current appraised value as then appraised by the appropriate governmental authority without prior written consent of the Department unless the balance on the Loan will be paid at closing.

(o) Housing units assisted with HOME funds must meet or exceed the TMCS, as applicable, and all applicable codes and standards. In addition, housing that is Rehabilitated under this chapter must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the Final Rule.

§53.32. Homebuyer Assistance Program (HBA).

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation, Reconstruction, or New Construction of single family housing units.

(b) Eligible property types are limited to single family dwellings, condominium units and cooperative units in mutual housing projects. An MHU is not an eligible property type for Rehabilitation. HOME funds may be used to replace (Reconstruct) an existing unit with a new MHU or Modular Home if:

(1) the unit complies with standards at 24 CFR §92.205 and with the Texas Manufactured Housing Standards Act;

(2) the unit is permanently installed;

(3) the unit is permanently attached to utilities; and

(4) the ownership of the unit is recorded in the taxing authority of the county in which it is located.

(c) The Household must comply with the following initial eligibility requirements:

(1) occupy the assisted single family unit as its Principal Residence;

(2) be an Income Eligible Household and for contract for deed conversion, the Households Annual Income must not exceed 60% AMFI;

(3) be located within the Administrator's Service Area;

(4) meet all other eligibility requirements; and

(5) complete a homebuyer counseling program/class.

(d) The Property must not be encumbered with tax liens, child support liens, or mechanic or materialmen's liens.

(e) The maximum amount of assistance (including soft costs), unless otherwise specified in the NOFA, to an eligible Household for downpayment and closing cost assistance is based on Household size and AMFI as follows:

(1) For Persons with Disabilities: $15,000;

(2) For a 1 to 4 Person Household at 80% or less of the AMFI: $10,000;

(3) For a 5 or more Person Household at 80% or less of the AMFI purchasing a house with a minimum of 4 bedrooms: $15,000;

(4) For a 1 to 4 Person Household at 60% or less of the AMFI: $15,000; and

(5) For a 5 or more Person Household at 60% or less of the AMFI purchasing a house with a minimum of 4 bedrooms: $20,000.

(f) The maximum amount of assistance for Rehabilitation that is not Reconstruction to an eligible Person with Disabilities Household that is also using funds for acquisition is $20,000. Rehabilitation assistance must be utilized for accessibility modifications to the unit.

(g) The maximum amount of assistance to an eligible Household for acquisition and closing costs for a contract for deed conversion is $25,000. In the case of a contract for deed conversion housing unit that involves both the acquisition of a loan on an existing MHU and/or the loan for the associated land, the Executive Director may grant an exception to exceed this amount, however, the Executive Director will not grant an exception to exceed $40,000 of assistance.

(h) The maximum amount of assistance for Rehabilitation to an eligible Household for a contract for deed conversion is limited to the OCC Program Activity requirements in §53.31(g) of this subchapter.

(i) When an MHU is being replaced with newly constructed housing (site-built) or any housing unit being replaced on an alternate site, the maximum amount of assistance to an eligible Household is based on Household size:

(1) Rehabilitation that is Reconstruction for 1 to 4 person Household: $65,000;

(2) Rehabilitation that is Reconstruction for 5 to 6 person Household: $72,500;

(3) Rehabilitation that is Reconstruction for 7 or more person Household: $80,000; and

(j) The minimum amount of assistance to an eligible Household is $1,000.

(k) The purchase price of the housing unit, plus the value of the Rehabilitation or Reconstruction if applicable, must not exceed 95% of the area's median purchase price as specified in the HUD §203(b) Limits.

(l) The total amount of assistance under this section and Program Activity, including Rehabilitation and activities involving contract for deed conversion, an MHU being replaced with newly constructed housing (site-built), and a housing unit being replaced on an alternate site, will be provided in the form of a zero percent (0%) deferred, forgivable Loan with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(m) The following first lien purchase loan requirements are imposed for households receiving Homebuyer Assistance:

(1) No adjustable rate mortgage loans (ARMs) are allowed;

(2) No mortgages with a loan to value equal to or greater than 100% are allowed;

(3) No Subprime Mortgage Loans are allowed;

(4) An origination fee and any other fees associated with the mortgage loan may not exceed 2% of the loan amount; and

(5) The debt to income ratio (back-end ratio) may not exceed 45%.

(n) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro-rata basis until maturity of the Loan.

(o) In the event that the housing unit ceases to be the Principal Residence of the Household, the Department has established that the federal recapture requirements as defined in 24 CFR §92.254 will be imposed.

(p) In the event that the housing unit ceases to be the Principal Residence of the Household, the forgiveness of the Loan, if applicable, will cease.

(q) In the event that the housing unit is sold, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and the housing unit must be sold for an amount not less than the current appraised value as then appraised by the appropriate governmental authority unless the balance on the Loan will be paid at closing.

(r) Housing units that will be rehabilitated with HOME funds must meet or exceed the TMCS, as applicable, and all applicable codes and standards. In addition, housing that is Rehabilitated under this chapter must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the Final Rule. Housing units that are provided assistance for acquisition only, must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

(s) This Program Activity is a CHDO-eligible activity.

§53.33. Tenant-Based Rental Assistance Program (TBRA).

(a) TBRA is provided to eligible tenants for payment of rental subsidies and for a period of time that does not exceed 24 months per Household. Security deposits and utility deposits may be provided in conjunction with rental assistance.

(b) The Household must comply with the following initial eligibility requirements:

(1) participate in an approved self-sufficiency program;

(2) maintain Principal Residency in the rental unit for which the subsidy is being provided;

(3) be an Income Eligible Household;

(4) reside in a rental unit that is located within the Administrator's Service Area; and

(5) meet all other eligibility requirements.

(c) Assistance to an eligible Household is limited by:

(1) for rental subsidy, cannot exceed twenty-four (24) months per Household per Contract; and

(2) for security deposit, cannot exceed two (2) months rent for the unit.

(d) The rental standard must not exceed HUD's "Fair Market Rent for the Housing Choice Voucher Program."

(e) Rental units must be inspected prior to occupancy and must comply with Housing Quality Standards established by HUD.

§53.34. Rental Housing Development Program (RHD).

(a) Eligible activities include the acquisition and New Construction or Rehabilitation of multifamily housing Developments and as further defined in the NOFA. Owners of rental units assisted with HOME funds must comply with income and rent restrictions for the duration of the required affordability period as required and defined at 24 CFR §92.252. Housing assisted with HOME funds must meet all applicable codes and standards. In addition, housing that is Newly Constructed or Rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with 24 CFR §92.251(a).

(b) This Program Activity is a CHDO-eligible activity.

§53.35. Single Family Housing Development Program.

(a) Eligible activities include the acquisition and New Construction or Rehabilitation of single family housing and as further defined in the NOFA. Single family housing units assisted with HOME funds must comply with the required affordability requirements as defined at 24 CFR §92.254. In addition, housing that is Newly Constructed or Rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the 24 CFR §92.251(a). If eligible, an Applicant that applies for Single Family Housing Development may also apply for Homebuyer Assistance.

(b) This Program Activity is a CHDO-eligible activity.

§53.36. CHDO Pre-Development Loan Program.

Applicants for pre-development loans will be required to have a summary description of a proposed Development and be able to show the necessary development experience to apply, as outlined in the NOFA and Application. Predevelopment loan funds may only be used for activities such as project-specific technical assistance, site control loans, and project-specific seed money. Pre-development Loans must be repaid from construction loan proceeds or other project income.

§53.37. Prohibited Activities.

Department awards may not be used to:

(1) Provide project reserve accounts, except as provided in 24 CFR §92.206(d)(5), or operating subsidies;

(2) Provide tenant-based rental assistance for the special purposes of the existing Section 8 program, in accordance with §212(d) of the Act;

(3) Provide non-federal matching contributions required under any other Federal program;

(4) Provide assistance authorized under §9 of the 1937 Act (Public Housing Capital and Operating Funds);

(5) Provide assistance to eligible low-income housing under 24 CFR Part 248 (Prepayment of Low Income Housing Mortgages), except that assistance may be provided to priority purchasers as defined in 24 CFR §248.101;

(6) Provide assistance (other than tenant-based rental assistance or assistance to a homebuyer to acquire housing previously assisted with HOME funds) to a project previously assisted with HOME funds during the period of affordability established by the PJ in the written agreement under 24 CFR §92.504. However, additional HOME funds may be committed to a project up to one year after project completion (24 CFR §92.502), but the amount of HOME funds in the Project may not exceed the maximum per-unit subsidy amount established under 24 CFR §92.250;

(7) Pay for the acquisition of Property owned by the PJ, except for Property acquired by the PJ with HOME funds, or Property acquired in anticipation of carrying out a HOME project;

(8) Pay delinquent taxes, fees or charges on Properties to be assisted with HOME funds;

(9) Pay for any cost that is not eligible under 24 CFR §§92.206 - 92.209;

(10) Assist Persons who owe payments identified by the Comptroller of Texas as relevant;

(11) Assist Households whose Property has current tax liens and/or judgments to the State of Texas against it; or

(12) Provide Rehabilitation on a housing unit without prior written consent of all Persons who have a valid lien or ownership interest in the Property.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER D. APPLICATION REQUIREMENTS AND PROCEDURES

10 TAC §§53.40 - 53.49

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter D, §§53.40 - 53.49, concerning the HOME Program Rule, Application Requirements and Procedures. These repeals are proposed in order to allow public comment and adoption of new rules governing the HOME Program, to coordinate the adoption of new HOME rules with new rules being adopted as part of the 2009 rule cycle.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§53.40. Competitive and Open Cycles.
§53.41. Eligible Applicants.
§53.42. Ineligible Applicants and Applications.
§53.43. Application Forms and Materials and Deadlines.
§53.44. General Applicant Eligibility Requirements.
§53.45. Rental Housing Development (Multifamily) Application Requirements.
§53.46. Multifamily Applicants also Seeking Housing Tax Credits.
§53.47. Application and Award Limitations.
§53.48. Application Review Process.
§53.49. Selection Criteria for Program Activities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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10 TAC §§53.40 - 53.49

The Texas Department of Housing and Community Affairs proposes new Chapter 53, Subchapter D, §§53.40 - 53.49. The proposed new sections make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no

effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive public input on the new sections and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§53.40. Competitive and Open Cycles.

All NOFAs will be presented to the Board. The Department will declare within a NOFA whether the application cycle will be a competitive or open cycle. Funds made available for disaster relief may not be released in a NOFA but will be provided in accordance with the Department's Deobligated Funds Policy §1.19 of this title.

§53.41. Eligible Applicants.

The following organizations or entities are eligible to apply for HOME eligible activities:

(1) nonprofit organizations;

(2) CHDOs;

(3) Units of General Local Government;

(4) for-profit entities and sole proprietors; and

(5) public housing agencies.

§53.42. Ineligible Applicants and Applications.

The following violations will cause an Applicant and any Applications they have submitted to be ineligible:

(1) The Applicant, Development Owner, or Developer is an Administrator of a previously funded Contract for which Department funds have been partially or fully deobligated due to failure to meet contractual obligations during the 12 months prior to application submission date, unless the deobligation was voluntary and prior to the contract term expiration date, or was the remainder on a completed Contract;

(2) The Applicant, Development Owner, or Developer has failed to submit a response to provide an explanation, evidence of corrective action or a payment of disallowed costs or fees as a result of a monitoring review;

(3) The Applicant, Development Owner, or Developer has failed to make timely payment or is delinquent on any loans or fee commitments made with the Department on the date of the Application submission;

(4) The Applicant, Development Owner, or Developer has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs or has otherwise been debarred by HUD or the Department;

(5) The Applicant, Development Owner, or Developer has violated the State's revolving door policy;

(6) The Applicant, Development Owner, or Developer has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline;

(7) The Applicant, Development Owner, or Developer at the time of Application submission is:

(A) subject to an enforcement or disciplinary action under state or federal securities law or by the NASD;

(B) subject to a federal tax lien;

(C) or is the subject of an enforcement proceeding with any governmental entity;

(8) The Applicant, Development Owner, or Developer with any past due audits has not submitted those past due audits to the Department in a satisfactory format on or before the Application submission date in accordance with §1.3 of this title;

(9) The submitted Application has an entire volume of the Application missing; has excessive omissions of documentation from the threshold Criteria or uniform Application documentation; or is so unclear, disjointed, or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department. If an Application is determined ineligible pursuant to this section, the Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibility will be included in the termination letter to the Applicant;

(10) The Applicant, Development Owner, or Developer or anyone that has Controlling ownership interest in the Development Owner or Developer that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA;

(11) The Application is a joint venture Application for the same Program Activity to serve the same town, city, or county that is identified in the Application already submitted as a sole Application for the same Program Activity in the same town, city or county;

(12) Applicant is requesting funding not related to Persons with Disabilities in a PJ; or

(13) Any Application that includes financial participation by a Person who, during the five-year period preceding the date of the bid or award, has been convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or Reconstruction efforts as a result of Hurricanes Rita or Katrina or any other disaster occurring after September 25, 2005, or was assessed a federal civil or administrative penalty in relation to such a contract.

§53.43. Application Forms and Materials and Deadlines.

(a) The Department will develop and publish on its website an Application and ASPM, that if completed, would satisfy the requirements for requesting funds from the Department. The Department may limit the eligibility of Applications in the NOFA and ASPM. Threshold and selection criteria and any other Application requirements will be specified in the NOFA approved by the Board.

(b) Applicants must submit an Application by the deadline date specified in the NOFA using the Application, ASPM and forms required by the Department. All Applications must be received during

business hours (8:00 a.m. to 5:00 p.m. Central Standard Time) on any business day.

§53.44. General Applicant Eligibility Requirements.

(a) An Applicant must satisfy each of the following requirements in order to be eligible to apply for HOME funding and as more fully described in the NOFA and Application, when applicable:

(1) provide evidence of its ability to carry out the program in the areas of financing, acquiring, rehabilitating, developing or managing affordable housing Developments;

(2) demonstrate fiscal, programmatic, and contractual compliance on previously awarded Department Contracts or Loans;

(3) demonstrate satisfactory performance otherwise required by Department rules and set out in the Application; and

(4) comply with all requirements to utilize the Department's website to provide necessary data to the Department.

(b) Noncompliance. Each Application will be reviewed for its compliance history by the Department, consistent with Chapter 60 of this title. Applications containing Persons found to be in Material Noncompliance, or otherwise violating the compliance rules of the Department, will be terminated.

(c) All entities receiving funds of $25,000 or more must be registered in the federal Central Contractor Registration (CCR) and have a current Data Universal Numbering System (DUNS) number.

§53.45. Rental Housing Development (Multifamily) Application Requirements.

(a) Rental Housing Development site and development restrictions include all those items referred to in the Final Rule, and any additional items included in the NOFA for RHD.

(b) Developments involving New Construction will be limited to 252 Units. These maximum unit limitations also apply to those Developments which involve a combination of Rehabilitation and New Construction. Developments that consist solely of acquisition and Rehabilitation or Rehabilitation only may exceed the maximum unit restrictions. Developments in Rural Areas are limited to no more than 80 units. The minimum number of units shall be 4 units.

(c) For funds being used for RHD, the Development Owner must establish a reserve account consistent with Texas Government Code, §2306.186, and as further described in §1.37 of this title.

(d) Unless further restricted or amended by the NOFA, Applications must comply with all of the current Qualified Allocation Plan and Rules in effect at the time of application's submission at 10 TAC §50.9(h), excluding paragraphs (4)(A), (4)(I), (11), (12) and (15).

§53.46. Multifamily Applicants also Seeking Housing Tax Credits.

Applicants who are seeking housing tax credits and are also seeking funds under this Chapter for the same Development must meet the requirements under the Qualified Allocation Plan for the year in which they are applying for these funds and all of the requirements of this subchapter unless specifically waived by the Department.

§53.47. Application and Award Limitations.

(a) The Department reserves the right to reduce the amount requested in an Application based on Program Activity or Project feasibility, underwriting analysis, or availability of funds.

(1) The Contract award amount, including administrative costs, shall not exceed the established amount in the NOFA.

(2) The Contract award amount for disaster relief shall not exceed $500,000 per state or federally declared disaster, or as may be otherwise allowed by the Board. Only one Application per affected Unit of General Local Government may be submitted for each declared disaster. Public Housing Authorities (PHAs) and Nonprofit organizations may only act as an Applicant, in lieu of the Unit of General Local Government, if they are so designated by the affected Unit of General Local Government. If the disaster is a federally declared disaster, the Applicant may not submit an application or be funded until 90 days have expired from the federal declaration date. Applications for disaster relief will only be accepted within six (6) months after the first day assistance under this program is made available.

(3) The Contract Award amount for RHD or Single Family Development activities shall not exceed the established amount in the NOFA. The Department reserves the right to set maximum loan to value limitations and minimum Match requirements on all Development activities.

(4) The Contract award amount for CHDO Operating Expenses shall not exceed:

(A) the lesser of clauses (i) or (ii) of this subparagraph:

(i) fifty percent (50%) of the CHDO's total annual operating expenses in that fiscal year; or

(ii) five percent (5%) of the CHDO funds awarded for the Project from the CHDO Set-Aside; and

(B) $75,000, whichever is greater.

(C) An Applicant shall not receive more than one award of CHDO operating funds during the same fiscal year of the Department regardless of the number of Applications submitted.

(5) The Contract award amount for CHDO Predevelopment Loans may not exceed $50,000 per Application. Applicants may submit only one Application per NOFA to cover eligible costs.

(b) An Applicant may submit an Application to apply for additional funding as long as the Applicant is 100% committed on their current contract for the same activity.

§53.48. Application Review Process.

(a) Applications received by the Department in response to an Open Application Cycle NOFA will be handled in the following manner:

(1) The Department will accept Applications on an ongoing basis, during the Application Acceptance Period specified in the NOFA or until such date when the Department makes notice to the public that an Open Application Cycle has been closed, whichever is earlier; and

(2) Each Application will be handled on a first-come, first-served basis as further described in this section. Each Application will be assigned a Received Date based on the date and time it is physically received by the Division. Then each Application will be reviewed on its own merits in three review phases, as applicable. Applications will continue to be prioritized for funding based on its Received Date unless it does not proceed into the next phase(s) of review. Applications proceeding in a timely fashion through a phase will take priority over Applications that may have an earlier Received Date but that did not timely complete a phase of review.

(A) Phase One will begin as of the Received Date and will include a review of eligibility and threshold criteria and all Application requirements. The Department will ensure review of materials required under the NOFA and ASPM and will issue a notice of any Administrative Deficiencies for threshold criteria and eligibility within 45 days of the Received Date. Applicants who are able to resolve their Administrative Deficiencies within five (5) business days

will be forwarded into Phase Two, if applicable. Applications with Administrative Deficiencies not cured within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase and do not require additional review in Phase Two or Three will be reviewed for recommendation to the Board by the Committee.

(B) Phase Two will include a comprehensive review for financial feasibility for RHD and Single Family Development Program Activities. Financial feasibility reviews will be conducted by the Real Estate Analysis (REA) Division consistent with §1.32 of this title. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. The Department will issue a notice of any Administrative Deficiencies within 45 days of the date the Application enters Phase Two. Applicants who are able to resolve their Administrative Deficiencies within five (5) business days will be forwarded into Phase Three, if applicable. Applications with Administrative Deficiencies not satisfied within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase and do not require additional review in Phase Three will be reviewed for recommendation to the Board by the Committee.

(C) Phase Three will only entail the review of the CHDO Certification Application. The Department will ensure review of these materials and issue notice of any Administrative Deficiencies on the CHDO Certification Application within 30 days of the Application enters Phase Three. Applicants who are able to resolve their Administrative Deficiencies within five (5) business days will be forwarded into the final review phase of the Application process. Applications with Administrative Deficiencies not cured within five (5) business days, will be terminated and must reapply for consideration of funds. Only upon satisfaction of all Administrative Deficiencies will the Application be forwarded to the final phase of the Application process. Upon completion of the applicable final review phase, the Application will be reviewed for recommendation to the Board by the Committee.

(3) Because Applications are processed in the order they are received by the Department, it is possible that the Department will expend all available HOME funds before an Application has completed all phases of its review. In the case that all HOME funds are committed before an Application has completed all phases of the review process, the Department will notify the applicant that their application will remain active for ninety (90) days in its current phase. If new HOME funds become available, Applications will continue onward with their review without losing their Received Date priority. If HOME funds do not become available within ninety (90) days of the notification, the Applicant will be notified that their Application is no longer under consideration. The Applicant must reapply to be considered for future funding. If on the date an Application is received by the Department, no funds are available under this NOFA, the Applicant will be notified that no funds exist under the NOFA and the Application will not be processed.

(b) Applications received by the Department in response to a Competitive Application Cycle NOFA will be handled in the following manner:

(1) The Department will accept Applications on an ongoing basis during the Application Acceptance Period as specified in the NOFA;

(2) Applications submitted and accepted by the Department will be reviewed for eligibility, threshold and selection criteria and all Application requirements. The Department will ensure review of materials required under the NOFA and ASPM. A comprehensive review of financial feasibility for RHD and Single Family Development Program Activities will be conducted by the Real Estate Analysis (REA) Division consistent with §1.32 of this title. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. If applicable, a review of the CHDO Certification Application will be performed. The Department will issue a notice of any Administrative Deficiencies for items reviewed within 45 days of the Received Date. If Administrative Deficiencies are not cured to the satisfaction of the Department within five (5) business days of the deficiency notice date, then five (5) points shall be deducted from the selection score for each additional day the Administrative Deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected within seven (7) business days from the deficiency notice date, then the Application shall be terminated; and

(3) Upon completion of review and no unresolved Administrative Deficiencies, the Application will be reviewed for recommendation to the Board by the Committee.

(c) Administrative Deficiencies. If an application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies including threshold and/or selection criteria documentation and/or financial feasibility analysis. The Department staff may request clarification or correction in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. To cure an Administrative Deficiency, an Applicant must provide a clarification, further definition or exposition of an issue, an explanation as to why an Applicant has provided certain information, or resolution of a discrepancy where an Applicant has provided conflicting information. An Administration Deficiency may not be cured by substantially changing an Application or providing any new unrequested information. An Applicant may not change or supplement any part of an Application in any manner after submission to the Department, and may not add any Set-asides, increase their award amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Real Estate Analysis Division to remedy an Administrative Deficiency as further described in this title or by amendment of an Application after a commitment or allocation of HOME funds.

(d) Decline to Fund. The Department may decline to fund any Application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Applications which are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department reserves the right to negotiate individual elements of any Application.

§53.49. Selection Criteria for Program Activities.

Selection criteria for any Program Activities will be described in the applicable NOFA and ASPM. The Applicant's self-score must be completed in the Application. An Applicant may not adjust the self-score without a request from the Department as a result of an Administrative Deficiency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER E. COMMUNITY HOUSING DEVELOPMENT ORGANIZATION (CHDO)

10 TAC §53.50

The Texas Department of Housing and Community Affairs proposes amendments to 10 TAC Chapter 53, Subchapter E, §53.50, concerning Application Procedures for Certification of CHDO. The proposed amendment makes changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended section as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on the amendment and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The amended section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amendments.

§53.50. Application Procedures for Certification of CHDO.

(a) An Applicant requesting certification as a CHDO must submit an application for CHDO certification in a form prescribed by the Department. The CHDO Application must be submitted with an Application for HOME funding under the CHDO Set-Aside. The Application must include documentation evidencing the requirements of this subsection:

(1) - (4) (No change.)

(5) The Applicant must have among its purposes the provision of decent housing that is affordable to low and moderate income people as evidenced by a statement in the organization's:

(A) Articles of Incorporation; [,]

(B) - (E) (No change.)

(6) The Applicant must have a clearly defined CHDO Service Area. The Applicant may include as its service area an entire Community, but not the whole state. The Applicant must provide evidence of its participation in the Community for each city/place or county listed in the Service Area. Private nonprofit organizations serving special populations must also define the geographic boundaries of its Service Areas and provide evidence of its participation in the Community for each city/place or county listed in the Service Area. This paragraph [~~subparagraph~~] does not require a private nonprofit organization to represent only a single neighborhood.

(7) An Applicant must have the following capacity and experience:

(A) Conforms to the financial accountability standards of 24 CFR §84.21, "Standards of Financial Management Systems" as evidenced by:

(i) a notarized statement by the Executive Director or chief financial officer of the organization in a form prescribed by the Department;

(ii) a certification from a Certified Public Accountant; or,

(iii) a HUD approved audit summary; and,

(iv) - (vi) (No change.)

(vii) a written narrative describing [~~describe~~] the organization's ability to manage additional rental development activities, if applicable.

(B) - (C) (No change.)

(8) An Applicant must have the following organizational structure. The Applicant must maintain at least one-third of its governing board's membership for residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations in the Applicant's service area. Low-income neighborhoods are defined as neighborhoods where 51% or more of the residents are low-income. Residents of low-income neighborhoods do not have to be low income individuals themselves. If a low-income individual does not live in a low-income neighborhood as herein defined, the low-income individual must certify that he qualifies as a low-income individual. This certification is in addition to the affidavit required in subparagraph (B) of this paragraph. For the purpose of this paragraph, elected representatives of low-income neighborhood organizations include block groups, town watch organizations, civic associations, neighborhood church groups, Neighbor Works organizations and any organization composed primarily of residents of a low-income neighborhood as herein defined whose primary purpose is to serve the interest of the neighborhood residents. Compliance with this paragraph shall be evidenced by:

(A) a written provision or statement in the organizations Bylaws, Charter or Articles of Incorporation;

(B) an affidavit in a form prescribed by the Department signed by the organization's Executive Director and notarized; and

(C) a current roster of all Board of Directors, including names and mailing addresses. The required one-third low-income residents or elected representatives must be marked on list as such.

(9) The Applicant must provide a formal process for low-income, program beneficiaries to advise the organization in all of its decisions regarding the design, siting, development, and management of affordable housing projects. The formal process should include a system for community involvement in parts of the private nonprofit organization's service areas where housing will be developed, but which are not represented on its boards. Input from the low-income community is not met solely by having low-income representation on the board. The formal process must be in writing and approved or adopted by the private nonprofit organization, as evidenced by:

(A) an organization's Bylaws; or

(B) a written statement of operating procedures approved by the governing body. Statement must be original letterhead, signed by the Executive Director and evidence date of board approval; and

(C) a [~~A~~] Resolution as prescribed by the Department and evidence date of board approval.

(10) A local or state government and/or public agency cannot qualify as a CHDO, but may sponsor the creation of a CHDO. A private nonprofit organization may be chartered by a State or local government, but the following restrictions apply:

(A) - (D) (No change.)

(E) Compliance with subparagraphs (A) - (E) of this paragraph shall be evidenced by the Applicant's:

(i) [~~organization's~~] Bylaws with evidence date of board approval;

(ii) - (iii) (No change.)

(11) If the Applicant is sponsored or created by a for-profit entity, the for-profit entity may not appoint more than one-third of the membership of the Applicant's governing body, and the board members appointed by the for-profit entity may not, in turn, appoint the remaining two-thirds of the board members, as evidenced by the Applicant's:

(A) - (C) (No change.)

(D) An Applicant may be sponsored or created by a for-profit entity provided the for-profit entity's primary purpose does not include the development or management of housing, as evidenced in the for-profit organization's Bylaws. If an Applicant is associated or has a relationship with a for-profit entity or entities, the Applicant must prove it is not controlled, nor receives directions from individuals, or entities seeking profit as evidenced by:

(i) the Applicant's [~~organization's~~] Bylaws with evidence date of board approval; or

(ii) a Memorandum of Understanding (MOU);

(12) CHDOs [~~CHDO~~] that are in partnership agreements associated with the Development must maintain effective Control and decision making control over the Development. All legally binding ownership and/or partnership agreements must clearly state the CHDO's role in the Development, as evidenced by the Applicant's:

(A) - (D) (No change.)

(13) Religious or Faith-based Organizations may sponsor a CHDO if the CHDO meets all the requirements of this section. While the governing board of a CHDO sponsored by a religious or a faith-based organization remains subject to all other requirements in this section, the faith-based organization may retain control over appointments to the board. If a CHDO is sponsored by a religious organization, the following restrictions also apply:

(A) - (C) (No change.)

(D) Compliance with subparagraphs (A) - (C) of this paragraph may be evidenced by the Applicant's:

(i) [~~Organization's~~] Bylaws;

(ii) - (iii) (No change.)

(b) (No change.)

(c) Community Housing Development Organizations (CHDO) that have received an award of HOME funds must submit recertification documentation every two years. The recertification documentation is due to the Department biannually on the last day of the anniversary month in which the Board approved the CHDO Set-Aside award. The recertification documentation must include, but is not limited to:

(1) A narrative describing the housing production objectives accomplished over the last 2-year period; [~~.~~]

(2) A description of any ongoing/future initiatives; [~~.~~]

(3) A statement of objectives for the CHDO over the next two years; [~~.~~]

(4) A timeline and budget describing the completion of any development activities undertaken by the CHDO within the last two years; [~~.~~]

(5) An organizational chart listing current personnel and a brief description of each individual's position, primary responsibilities and authority in the organization; [~~.~~]

(6) A written statement indicating how the current organization's financial structure can support housing development activities in the future; [~~.~~]

(7) A written statement describing how the CHDO will continue to leverage other resources in the future; and [~~.~~]

(8) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200804833
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER F. AWARD AND CONTRACTS

10 TAC §§53.70 - 53.73

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter F, §§53.70 - 53.73, concerning the HOME Program Rule, Award and Contracts. These repeals are proposed in order to allow public comment and adoption of new rules governing the HOME Program, to coordinate the adoption of new HOME rules with new rules being adopted as part of the 2009 rule cycle.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§53.70. Process for Awards.

§53.71. Contract Required after Award.

§53.72. Contract Terms.

§53.73. Contract Amendments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER F. AWARDS AND CONTRACTS

10 TAC §§53.70 - 53.74

The Texas Department of Housing and Community Affairs proposes new Chapter 53, Subchapter F, §§53.70 - 53.74. The proposed new sections make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive public input on the new sections and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978.ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§53.70. Process for Awards.

(a) All recommendations for awards will be presented to the Committee before presentation to the Board. All Applications must comply with all applicable program requirements or regulations established in 24 CFR Part 92 and in this chapter.

(b) Applicants applying in response to an Open Application Cycle will be prioritized for recommendation to the Board based on the process described in §53.48 of this chapter and as otherwise specified in the NOFA.

(c) Applicants applying in response to a Competitive Application Cycle will be ranked by highest score per Program Activity, per Uniform State Service Region and Area Type, unless otherwise specified in the NOFA.

(1) If sufficient qualified Applications are not received for a Program Activity in a Uniform State Service Region and Area Type, the funds will be redirected to the next Uniform State Service Region

that had a higher number of qualified Applicants for that same Program Activity type, unless otherwise specified in the NOFA.

(2) If sufficient Applications are not received in a Uniform State Service Region and Area Type for a Program Activity, the funds will be redirected to the Uniform State Service Region and Area Type with the highest number of qualified Applicants for another Program Activity type, unless otherwise specified in the NOFA.

(d) In the event of a tie between two or more Applicants, the Department reserves the right to determine which Application will receive a recommendation for funding, or as otherwise specified in the NOFA. Tied Applicants may also receive a partial recommendation for funding.

(e) When the remainder of the allocation for an allocation within a Uniform State Service Region is insufficient to completely fund the next ranked Application in the Program Activity or Uniform State Service Region, it is within the discretion of the Department to:

(1) award a partial amount to the next ranked Application, reducing the scope of the Application proportionally;

(2) make necessary adjustments to fully fund the Application; or

(3) transfer the remaining funds to other Program Activities or Uniform State Service Regions.

(f) Applications may also receive a partial recommendation for funding. A minimum award amount may be established to ensure feasibility.

(g) Applications receiving a favorable EARAC recommendation are presented to the Board for approval, pending the availability of HOME funds.

(h) Applicants may appeal staff's decision regarding their Applications in accordance with §1.7 of this title.

(i) Board approval of the award of any HOME funds, acquisition or construction activities will be conditional upon a completed Loan closing and any other conditions deemed necessary by the Department.

§53.71. Contract Required after Award.
Any Program Activity funded under this program will be governed by a written Contract that identifies the terms and conditions related to the awarded funds. The Contract will not be effective until executed by all parties to the Contract. Any amendments must be in writing and are subject to the requirements of this chapter.

§53.72. Pre-Award Costs.
Before the effective date of the HOME Contract, the Contract Administrator may incur and be reimbursed for travel costs, as provided for with Administrative funds, related to mandatory implementation training required by the Department as a condition of receiving a HOME award and Contract.

§53.73. Contract Terms.
(a) Unless otherwise changed by agreement of the parties in a Contract or the applicable NOFA, the terms found in Contract shall be consistent with the following and performance under the Contract will be evaluated with the following benchmarks:

(1) OCC Program Activity. The Contract term will not exceed 24 months. Performance under the Contract term will be based on the following benchmarks from the Contract begin date:

(A) 6 months, exempt administrative and broad review environmental clearance must be complete, and if not tiering, the first Household to be assisted must be environmentally cleared;

(B) 8 months, Authority to Use Grant Funds must be fully executed and all Households to be assisted must be environmentally cleared;

(C) 12 months, 100% of funds must be committed to Households to be assisted;

(D) 18 months, 100% of Household's Loans must be closed, if applicable;

(E) 22 months, 100% of construction must be complete for all Households to be assisted; and

(F) 24 months, 100% funds drawn and 100% of match requirement supplied.

(2) HBA Program Activity. The Contract term will not exceed 24 months. Performance under the Contract term will be based on the following benchmarks from the Contract begin date:

(A) 6 months, exempt administrative and environmental clearance must be complete for at least one Household to be assisted;

(B) 12 months, environmental clearance must be complete for at least 50% of the Households to be assisted, 50% of funds must be committed, 25% of funds drawn, and 25% of match supplied;

(C) 18 months, environmental clearance must be complete for at least 75% of the Households to be assisted, 75% of funds must be committed, 50% of funds drawn, and 50% of match requirement supplied; and

(D) 24 months, 100% of funds must be committed, 100% of funds drawn, and 100% of matched supplied.

(3) TBRA Program Activity. The Contract term will not exceed 36 months. Performance under the Contract term will be based on the following benchmarks from the Contract begin date:

(A) 6 months, exempt administrative environmental clearance must be complete and application intake complete for 30% for Households to be assisted;

(B) 9 months, application intake complete for 75% for Households to be assisted;

(C) 12 months, 100% of funds must be committed to Households to be assisted and 25% of funds drawn;

(D) 18 months, 100% of funds already committed and 35% of funds drawn;

(E) 24 months, 100% of funds already committed and 50% of funds drawn; and

(F) 36 months, 100% of funds already committed and 100% of funds drawn.

(4) Rental Housing Development and Single Family Housing Development Program Activity. The Contract term will not exceed 36 months based on the size of the development and length of the Development period. Performance under the Contract term will be based on benchmarks established in the Contract and specific to the Development. Repayment of Loans or affordability periods will extend beyond the Contract end date depending on the Final Rule and Texas Government Code, Chapter 2306 requirements.

(5) CHDO Pre-Development Loans. The initial contract term will not exceed 24 months. Repayment is expected from development funds if development is begun prior to 24 months.

(b) Revised benchmarks and/or lower percentages, due to extenuating or unforeseeable circumstances, may be allowed and as approved by the Department.

§53.74. Contract Amendments.

(a) Amendment requests to be approved by the Executive Director of the Department are allowable under the following circumstances:

(1) Time extensions. The Executive Director may collectively provide up to one six-month extension to the end date of any Contract. Any additional time extension granted by the Executive Director shall include a statement by the Executive Director relating to unusual, non foreseeable, or extenuating circumstances that warrant more than a six-month extension. If the extension is longer than six months and the Executive Director determines that a statement related to unusual, non-foreseeable, or extenuating circumstances cannot be issued, it will be presented to the Board for approval, approval with modifications, or denial of the requested extension;

(2) Changes in Match. The Executive Director may grant approval of a modification or amendment to the dollar amount of the Match requirement, if such amendment that does not decrease the dollar amount by more than 25% of the original amount committed. In the cases where the reduction in Match is greater than 25% or significantly decreases the benefits to be received by the Department, in the estimation of the Executive Director, will be presented to the Board for approval;

(3) Changes in Area Median Family Income (AMFI) levels. The Executive Director may grant approval of a modification or amendment to the AMFI levels of the households to be served under said contract, if Contract Administrator provides a statement relating to unusual, non-foreseeable, or extenuating circumstances that warrant such a request to be granted and the Executive Director determines that such request does not violate Department rules. In the case that the Executive Director determines that such request is not warranted and/ or violates Department rules, the request will be presented to the Board for approval;

(4) Changes to Services Areas. The Executive Director may grant approval of the modification or amendment to the Service Area being served under said contract, if Contract Administrator provides a statement relating to unusual, non-foreseeable, or extenuating circumstances that warrant such a request to be granted and the Executive Director determines that does not violate Department rules. In the case that the Executive Director determines that such request is not warranted and/or violates Department rules, the request will be presented to the Board for approval;

(5) Changes in number of Households to serve. The Executive Director may grant approval of the modification or amendment to the reduction in the number of the Households to be served under said contract, if Contract Administrator provides a statement relating to unusual, non-foreseeable, or extenuating circumstances that warrant such request to be granted and the Executive Director determines that such request does not violate Department rules. In the case the Executive Director determines that such request is not warranted and/or violates Department rules, the request will be presented to the Board for approval; and

(6) Increase in funds. In the case of a modification or amendment to the dollar amount of the Contract, such modification or amendment does not increase the dollar amount by more than 25% of the original Contract or $50,000, whichever is greater. Modifications and/or amendments that increase the dollar amount by more than 25% of the original Contract or $50,000, whichever is greater; or significantly decrease the benefits to be received by the Department, in the estimation of the Executive Director, will be presented to the Board for approval.

(b) If the Administrator or Development Owner fails to meet a benchmark requirement and does not seek, or is not granted, an extension of a benchmark, the awarded funds related to the lack of performance may be entirely or partially deobligated at the Department's sole discretion.

(c) Waiver. The Board, in its discretion and within the limits of federal and state law, may waive any one or more of the requirements of this chapter if the Board finds that waiver is appropriate to fulfill the purposes or policies of Texas Government Code, Chapter 2306, or for good cause, as determined by the Board.

(d) Accounting Requirements. Within 60 days after the Contract end date, the Administrator or Development Owner shall provide a full accounting of funds expended under the terms of the Contract. Failure of an Administrator or Development Owner to provide full accounting of funds expended under the terms of a Contract shall be sufficient reason for the Department to deny any future Contract to the Administrator or Development Owner.

(e) Individual benchmarks. Each benchmark is an individual term and subject to the amendment processes. An interim benchmark extension may or may not extend the entire Contract at the Department's discretion.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER G. LOANS AND CONTRACT ADMINISTRATION

10 TAC §§53.80 - 53.86

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter G, §§53.80 - 53.86, concerning the HOME Program Rule, Loans and Contract Administration. These repeals are proposed in order to allow public comment and adoption of new rules governing the HOME Program, to coordinate the adoption of new HOME rules with new rules being adopted as part of the 2009 rule cycle.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of

new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§53.80. Documents Supporting Mortgage Loans.

§53.81. General Contract Administration.

§53.82. Conflict of Interest.

§53.83. Procurement.

§53.84. Project Setups and Disbursement Requests.

§53.85. Soft Cost Limitations.

§53.86. Performance Reviews and Sanctions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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10 TAC §§53.80 - 53.85

The Texas Department of Housing and Community Affairs proposes new Chapter 53, Subchapter G, §§53.80 - 53.85. The proposed new sections make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the HOME program manuals and include revisions of necessary policy and administrative changes to further enhance operations by deleting compliance penalty provisions from the rule.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be enhanced compliance with all statutory requirements, formalized policy and guidelines contained in the HOME program manuals, and further enhanced operations of the HOME program. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 19, 2008 to October 20, 2008 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2009 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 20, 2008.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§53.80. Documents Supporting Mortgage Loans.

(a) Administrators and Development Owners must not proceed or allow a contractor to proceed with construction, including demolition, on any Activity, Project or Development without first completing the required environmental clearance procedures and Loan closing with the Department.

(b) A mortgage Loan shall be evidenced by a mortgage or deed of trust note or bond and by a mortgage that creates a lien on the housing development and on all real property that constitutes the site of or that relates to the housing development.

(c) A note or bond and a mortgage or deed of trust:

(1) must contain provisions satisfactory to the Department;

(2) must be in a form satisfactory to the department; and

(3) may contain exculpatory provisions relieving the borrower or its principal from personal liability if the department agrees.

(d) For each Loan made for the Development of multifamily housing with funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 USC §§12701, et seq.), the Department shall obtain a mortgagee's title policy in the amount of the loan. The Department may not designate a specific title insurance company to provide the mortgagee title policy or require the borrower to provide the policy from a specific title insurance company. The borrower shall select the title insurance company to close the loan and to provide the mortgagee title policy.

(e) Documentation required for OCC and HBA with Rehabilitation Loans: The Administrator must ensure the following documents are submitted to the Department in order to request Loan documents be prepared for the Household:

(1) A title report no older than ninety (90) days that evidences Homeownership and no tax lien, no child support lien, no mechanic's lien and no materialmen's lien;

(2) Tax certificate no older than ninety (90) days that evidences a current paid status, and in the case of delinquency, evidence of an approved payment plan with the taxing authority and evidence that the payment plan is current;

(3) Life event documentation, as applicable;

(4) A copy of the original contract for deed, for contract for deed conversion Loan; and

(5) A current payoff statement, for contract for deed conversion Loan.

(f) Trailing documentation requirements for Loans. Within ninety (90) days after the Loan closing date, the Administrator or Development Owner must submit to the Department the original recorded deed of trust and transfer of lien, if applicable. Failure to submit these documents within ninety (90) days after the Loan closing date will result in the Department withholding payment for disbursement requests.

§53.81. General Contract Administration.

All Administrators and Development Owners must use the forms provided on the Department's website and comply with the Department's procedural and documentation requirements as outlined in the HOME Program Manual and in this section including:

(1) Contract must be signed and executed by all appropriate authorized parties;

(2) Attend training as required by the Department;

(3) Develop and comply with written procurement selection criteria and committees;

(4) Procure consultants, if applicable. Consultants may not participate in or direct any part of the process for procuring consultants;

(5) Complete all applicable Department Contract System access request forms and requirements;

(6) Perform environmental clearance procedures before committing or expending funds to a Project or Activity, performing any construction activities, including demolition, or the occurrence of the Loan closing, if applicable;

(7) Develop and comply with written accounting, reporting, filing, and documentation procedures;

(8) Develop and comply with written applicant intake and selection criteria for and ensure program eligibility which must include, but is not limited to:

(A) Homeownership, if applicable;

(B) Income eligibility;

(C) Assisted Households must be located within the Administrator's Service Area, as defined by the Contract;

(D) Property taxes are current, if applicable; and

(E) Assist Special Needs Households, if applicable.

(9) Develop and comply with affirmative marketing procedures in accordance with the Final Rule;

(10) Complete applicant intake and applicant selection. Notify each applicant Household in writing of either acceptance or denial of HOME assistance within sixty (60) days following receipt of the intake application;

(11) To ensure compliance with the Texas Comptroller of Public Accountants requirements, Contract Administrators are required to ensure the applicant Household does not owe a debt to the State of Texas including tax liens, child support liens, or student loan delinquencies;

(12) Ensure that no Conflict of Interest exists between Households to be assisted and Persons designated to receive or assist with the application intake process;

(13) Document and verify all income and asset eligibility requirements for the Household to be assisted;

(14) Ensure compliance with applicable audit certification requirements;

(15) Ensure that the demolition and removal of all dilapidated units on the lot occurs prior to the Household's occupancy of the Newly Constructed or Rehabilitated housing unit;

(16) Ensure and verify that each building construction contractor performing activities in the amount of $10,000 or more under the Contract is registered and maintains good standing with the Texas Residential Construction Commission;

(17) Ensure and verify that each housing unit being rehabilitated in the amount of $10,000 or more under the Contract is registered with the Texas Residential Construction Commission;

(18) Provide building construction contractor oversight and ensure builder's risk coverage is provided;

(19) Ensure that the demolition of any housing unit does not occur less than 6 (six) months prior to the Contract end date;

(20) Ensure compliance with applicable construction or property standards and lead-based paint requirements;

(21) Conduct appropriate property inspections and documentation in accordance with applicable program requirements;

(22) Submit required documentation and electronic requests for Project setups and disbursement requests to the Department;

(23) Submit support documentation for Project setups and disbursement requests within thirty (30) days of electronic submission to the Department;

(24) Submit all Project setups and support documentation for Households to be assisted no later than ninety (90) days prior to the Contract end date. In the event that a loan closing is required for single family Rehabilitation or Reconstruction, non-development activities, all Project setups and support documentation must be submitted no later than one hundred eighty (180) days prior to the Contract end date;

(25) Provide certification that no person or entity that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith;

(26) Provide certification that all contractors, consulting firms, Administrators, and Development Owners will sign an affidavit to attest that each request for payment of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(27) If required or requested, provide reasonable Match and submit required documentation to the Department;

(28) Not retain Program Income of any kind, including Program Income to fund other eligible HOME Activities;

(29) Submit any Program Income received to the Department within ten (10) days of receipt;

(30) Return any refunds to the Department's accounting division and include a written explanation of the return of funds, the Con-

tract number, name of Administrator or Development Owner, Activity address and Activity number referenced on the check;

(31) Submit required documentation for Project completion reports and certificate of Contract Completion no later than sixty (60) days from the Contract end date; and

(32) Complete the terms of the Contract.

§53.82. Conflict of Interest.

The Conflict of Interest provisions in 24 CFR §92.356 apply to any Person who is an employee, agent, consultant, officer, or elected official or appointed official of the Department, Administrator or Development Owner. All Administrators and Development Owners must comply with procedures to submit a request to the Department to grant an exception to any conflicts prohibited by 24 CFR §92.356. The request submitted to the Department must include a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made. No HOME funds can be used to assist a Household until HUD has granted an exception to the Conflict of Interest provisions.

§53.83. Procurement.

(a) All Administrators acting in the capacity of State Recipients must comply with procurement requirements and regulations established under 24 CFR Part 84 pertaining to the HOME Program, 24 CFR Part 92, Chapter 2254, Texas Government Code, and the HOME Program Manual, as well as any other applicable state and/or local procurement requirements.

(b) Administrators acting in the capacity of Subrecipients must comply with procurement requirements and regulations established under 24 CFR Part 85 pertaining to the HOME Program, as well as any other applicable state and/or local procurement requirements.

(c) Procurement procedures and the selection process must be integrated into the Administrator's HOME program and must comply with federal, state, and local procurement requirements. The Administrator must have a written code of conduct governing employees, officers, or agents engaged in administering a HOME Contract and appoint a Procurement Officer to manage the bid process.

(d) Procedures established for procurement of building construction contractors may not include requirements for the provision of general liability insurance coverage for an amount to exceed the value of the contract.

(e) HOME funds may not be used to directly or indirectly employ, award contracts to, or otherwise engage the services of any service provider or vendor during any period for which the service provider or vendor has been debarred, suspended, or designated as ineligible on the federal Excluded Parties Listing System.

(f) Building construction contractors must be procured using a formal sealed bid procedure for single family New Construction or Rehabilitation Activities or Projects.

(g) Professional service providers must be procured using an open competitive procedure for single family New Construction or Rehabilitation Activities or Projects. Professional services may not be procured based solely on the lowest priced bid. Consultants may not participate in or direct the process of procurement for consultants.

(h) Goods and services other than professional services and building construction contractors, for an amount less than $100,000 may be procured using documented price quotation procedures.

§53.84. Project Setups and Disbursement Requests.

All Administrators and Development Owners must comply with procedures and timeframes established by this Chapter and the HOME Program Manual to submit requests for Project setup and disbursement requests and support documentation required by the Department. The Department reserves the right to request additional documentation or clarification from the Administrator or Development Owners. Requests must be made electronically and submitted in accordance with applicable benchmarks to the Department using the online TDHCA Contract System database as defined in the "TDHCA Contract System Users Guide."

§53.85. Administrative and Soft Costs Limitations.

(a) The Department has established cost guidelines and limitations for administrative and soft costs related to the OCC, TBRA, and HBA Program Activities.

(1) Administrator must use funds for Administrative Costs in accordance with 24 CFR §92.207. For the OCC and HBA Program Activities, funds for Administrative Costs cannot exceed 4% of the Contract award for project costs for the entire Contract term. For the TBRA Program Activity, funds for Administrative Costs cannot exceed 4% of the Contract award for project funds per year of the Contract term.

(2) With the exception of Administrative Costs and Plans and specification manual per Contract, these costs are maximums per Activity or Project and may not be exceeded without approval by the Department. Upon prior approval of the Department, exceptions may be allowed in the case of Rehabilitation activities for lead-based paint hazard reduction and/or relocation and cost categories and limitations not identified in the proposed rule.

(3) Contract Administrators must certify that the amount being disbursed is for the actual amount of costs.

(4) Costs that may be categorized as either a project cost or an administrative cost are identified below. No duplicate disbursement of costs is allowed. Costs may only be disbursed as either a project cost or administrative cost but not both. Additionally, costs may only be disbursed once per occurrence when providing both acquisition and construction type of assistance to the same Project or Activity as may take place with, but not limited to, contract for deed conversions.

(5) Unless otherwise noted, all items are limited to one (1) occurrence per Project or Activity.

(6) Third-party project costs related to loan closing requirements, such as appraisals, title reports or insurance, tax certificates, and recording fees, are not subject to a maximum per Activity or Project. However, these costs are subject to the maximum amount of assistance established for the Program Activity.
Figure: 10 TAC §53.85(a)(6)

(b) The allowable activities for each cost category are defined as follows:

(1) Administrative costs are costs incurred for activities performed directly by the Administrator and include general management and oversight, salaries, wages and related costs of staff, travel costs incurred for official business in carrying out the Contract, public information, and other costs required for the administration of the program such as purchase of equipment, insurance, utilities, office supplies, and rental and maintenance (not purchase) of office space;

(2) Affirmative marketing plan is the cost incurred to develop a written plan for ensuring that marketing, advertising, and outreach activities are provided to all protected classes and to the populations being served by the Contract. This includes the development of advertising materials and hand-outs and public presentation;

(3) Application intake and processing is the cost incurred for the completion of all intake application documentation and forms,

verification of all sources of income, employment verification, asset verification and imputation and re-verification of all expired documentation. This includes all Department-required forms, worksheets, addenda and certifications required for the household's application intake and processing;

(4) Construction and disbursement documentation preparation is the cost incurred in the preparation of forms required by the Department that are related to construction or disbursement documentation and include electronic entry into the TDHCA Contract System, support documentation preparation and completion of Department-required forms including, but not limited to, the Contractor Request for Payment, Lien Waiver Affidavits, Final Bills Paid Affidavit and Certification of Completion;

(5) Environmental review is the cost incurred for the preparation and completion of all required forms, checklists and certifications, publication activities and Request for Release of Funds and Finding of No Significant Impact and Eight Step Process, if applicable;

(6) Exempt administrative environmental is the cost incurred in the completion of an exemption form for administrative expenses;

(7) Final inspection is the cost incurred in performing a final walk through and physical inspection of the assisted housing unit noting any deficient items that must be corrected before final payment and the completion of any Department-required forms or checklists;

(8) Financial management is the cost incurred in the management of all project and program accounts using a fund type accounting system that can trace each expense to an individual Project or to the program as a whole and ensures compliance with OMB circulars. A written or printed journal of all transactions including receipt and disbursement of funds should be included;

(9) Homebuyer counseling is the cost incurred to provide a minimum of eight hours of counseling provided by a certified homebuyer counselor. Instruction may include, but is not limited to, financial management, credit management, homebuyer education, and/or job training;

(10) Information services is the cost incurred to provide information to homeowners, prospective homebuyer and/or tenants. These may include the following:

(A) Fair housing--cost incurred to provide information to prospective homebuyers and tenants (not applicable to OCC);

(B) Loan procedures--cost incurred to provide information pertaining to fair lending practices, loan requirements, and closing procedures to participants in OCC and HBA (not applicable to TBRA);

(C) Warranty (Project cost only)--cost incurred to provide an explanation of the builder's homeowner warranty (must comply with Texas Residential Construction Commission requirements) to households assisted with Reconstruction or Rehabilitation activities;

(D) Lead-based paint--cost incurred to provide lead-based paint hazard notification to all applicants in all HOME Program Activities;

(11) Initial inspection is the cost incurred in the completion of the initial physical inspection of the housing unit to be assisted and Department-required forms and checklists. The inspection must identify all health and safety concerns regarding the housing unit, all sub-standard conditions that require repair or replacement to comply with applicable codes and standards and the TMCS, and provide enough detail to complete a work write-up, and if applicable, a justification of Reconstruction;

(12) Plans is the cost incurred to obtain a complete set of plans, which shall include a site plan for each housing unit showing known easements and lot set-backs, a floor plan, a front elevation, a foundation plan, a plumbing and electrical plan and a mechanical and energy efficiency plan. If these plans are purchased from or donated by a licensed architect or engineer they should bear the appropriate stamp. While builders may require less complete plan sets and it is understood that some of these details may be combined on the same sheet, any plans set that does not include this level of detail will be pro-rated accordingly;

(13) Pre-construction conference is the cost incurred in conducting a meeting with the homeowner and building construction contractor to explain and discuss the construction process being undertaken. This meeting should include a description of construction activities and procedures, expectations of the final product, an explanation of the roles and duties for all parties, detail and review of the timelines and contractual milestones, required access and use of utilities, provision of appropriate security measures, selection of products and improvements to be provided, and a discussion of appropriate handicap accessibility features;

(14) Procurement of contractor is the cost incurred in the preparation of bid documents, pre-bid advertising, conducting of the pre-bid conference, the verification of required builder certifications, conducting of the walk-through of housing units to be assisted, conducting checks of bidder qualifications and references, conducting bid opening including keeping minutes and tabulations, the review of the bids, conducting contract negotiation and verification, the notification of award and the completion of any Department-required forms;

(15) Procurement of professional service provider is the cost incurred to procure a professional service provider (i.e. consultant). The Administrator must use negotiated bidding procedures for the procurement of professional service providers (i.e. consultants) and provide for independent procurement of professional service providers (i.e. consultants may not participate in any aspect of procuring consultants);

(16) Progress inspections is the cost incurred in performing inspections at logical points during the construction process or prior to approving each draw that verify quality and completeness of work to date and are signed by the inspector and Contract Administrator. Upon completion of the progress inspection, the Contract Administrator must send a copy of the completed inspection report to the homeowner. The homeowner must also sign to acknowledge receipt of the completed Progress Inspection Report. Logical points of inspection include but are not limited to:

(A) Foundation--prior to pouring a monolithic foundation and after initial curing or alternatively after completion of piers;

(B) Framing--completion of framing;

(C) Rough-in--after completion of electrical and plumbing but before covering and placement of fixtures; and

(D) Substantial completion;

(17) Progress inspections should each require at least one hour and include inspection forms, filed notes, sketches, and/or photographs adequate for verification of that stage of completion;

(18) Project documentation preparation is the cost incurred in the preparation of forms required by the Department that are not related to income eligibility or construction and include, but are not limited to, the TDHCA Contract System Access Request, Direct Deposit Authorization, Texas Application for Payee Identification, and Audit Certification;

(19) Property inspections is the cost incurred to perform an inspection of the subject property in order to certify that no substandard conditions exist according to TMCS using the Department's forms;

(20) Punch list verification inspection is the cost incurred in performing a final physical inspection of the assisted housing unit to verify the completion of punch list items only;

(21) Recordkeeping is the cost incurred to develop, prepare and maintain a recordkeeping system in the order prescribed by the Departments which includes three separate types of filing for program, environmental, and project areas;

(22) Schedule of values is the cost incurred to prepare a line-item description of each work activity and its associated cost and enter electronically into the Department's Contract System as the budget;

(23) Specification manual is the cost incurred to prepare or obtain a single generic manual to be used for multiple sites or projects detailing the methods and materials to be used on all construction jobs. The homeowner's choices may be included but should be detailed for each job. All trade areas and construction activities must be included in the specification manual. In cases where there are no local requirements for specifications and TMCS are used, no additional cost should be requested for disbursement;

(24) Work write-up is the cost incurred to prepare or obtain a complete description of the work activity specific to Rehabilitation required to bring the entire structure into compliance with the applicable construction standards. It must include all units of measurement, materials to be used, methods of application, and all necessary construction detail and/or may be used in conjunction with a specification manual; and

(25) Work write-up/cost estimate is the cost incurred in performing the Feasibility Analysis which is a budgetary justification for Reconstruction which compares the cost of Rehabilitation to the replacement costs of a housing unit and in the completion of Department-required forms. The analysis must include a summary of the steps and costs required to correct the deficiencies identified in the initial inspection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804837
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 90. MIGRANT LABOR HOUSING FACILITIES

10 TAC §90.8

The Texas Department of Housing and Community Affairs (Department) proposes amendments to §90.8, concerning the application form for a license to operate a migrant labor housing facility. The Department proposes: (1) to change the assistance telephone number on the Application to Operate a Migrant Labor Facility and eliminate unnecessary language; (2) to add a form for requesting a License Renewal; and (3) to add the form that inspectors will use for conducting and documenting inspections.

Mr. Joe Garcia, Executive Director of the Manufactured Housing Division, who facilitates the Migrant Labor Facility program, has determined that for each year of the first five years that the proposed amendments are in effect there is no foreseeable implications relating to costs or revenues of the state or local governments.

Mr. Garcia has also determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of adopting the proposed amendments will be more usable forms and additional transparency in the inspection process. There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are affected by the proposed amendments.

Written comments may be submitted to Texas Department of Housing and Community Affairs, Attention: Kevin Hamby, General Counsel, P.O. Box 13941, Austin, Texas 78711-3941 or by e-mail to the following address: kevin.hamby@tdhca.state.tx.us. All comments must be received within 30 days of the date of the publication of this notice.

The proposed amendments are made pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed amendments.

§90.8. Forms.

(a) Appendix A--Application for a License to Operate a Migrant Labor Housing Facility form
Figure: 10 TAC §90.8(a)
[~~Figure: 10 TAC §90.8~~]

(b) Appendix B--Application for Renewal of License to Operate a Migrant Labor Housing Facility
Figure: 10 TAC §90.8(b)

(c) Appendix C--Report of Inspection--Migrant Labor Housing Facility
Figure: 10 TAC §90.8(c)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 305. PRACTICES AND PROCEDURES FOR HEARINGS AND DISCIPLINARY ACTIONS

SUBCHAPTER B. DISCIPLINARY PROCEEDINGS

10 TAC §305.21

The Texas Residential Construction Commission (commission) proposes amendments to §305.21, regarding the procedures for hearings and disciplinary actions. The proposed amendments clarify that grounds for the disqualification of a builder/remodeler or a third-party warranty company include a failure of payment for registration or registration renewal made to the commission.

The proposed amendments provide that a builder/remodeler or third-party warranty company's registration may be administratively withdrawn if the payment of a registration or renewal fee is returned due to insufficient funds or overdraft, which the applicant fails to correct within a reasonable time period.

Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amendments are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the amended section.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect the public will benefit from knowing that applicants that have failed to meet registration qualifications are not permitted to retain active a registration status.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no significant effect on individuals or large, small, or micro-businesses as a result of the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no adverse economic effect on small businesses that is not a direct result of the business' actions. Therefore, no regulatory flexibility analysis is necessary.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78701-3509 or by fax to (512) 475-2453. The deadline for submission of comments is 30 days from the date of publication of the proposed amendments in the *Texas Register*. Comments received after that date will not be considered. Comments should be arranged in the manner consistent with the organization of the amendments. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Grounds for Disqualification" in the subject line with the chapter number. Comments submitted electronically that are sent to a different address or that do not have "Grounds for Disqualification" in the subject line may not be considered.

The amendments are proposed pursuant to Property Code, §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of the Act; and Property Code, §§416.005, 416.006, and 416.008.

No other statutes, articles, or codes are affected by the proposed amendments.

§305.21. Commission Actions.

(a) - (d) (No change.)

(e) Upon finding that a registrant is no longer eligible for a certificate of registration under §416.005 or §416.006 of the Act, the commission shall deny or administratively withdraw a person's certificate of registration, or the commission may enter an order to revoke or suspend a person's certificate of registration if revocation or suspension is allowed under §418.002 of the Act.

(f) Pursuant to §416.008 of the Act and [~~10 TAC~~] Chapter 303, Subchapter A of this title, the commission, upon finding that an applicant for registration as a builder/remodeler is unqualified, shall deny the applicant's original or renewal application, or, if the certificate of registration has been issued, the certificate shall be administratively withdrawn.

(1) Grounds for disqualification may include the payment of a registration or renewal fee with a payment instrument, including a check, credit or debit card, or electronic funds transfer, that is returned due to insufficient funds or overdraft, whether before or after a registration certificate has been issued.

(2) The builder/remodeler shall be notified of the payment failure by certified mail to the person's last known business address of record with the commission.

(3) If full payment is not received within 15 calendar days from the date of receipt of the certified letter and the certificate of registration has been issued, the applicant's registration shall be administratively withdrawn.

(g) Pursuant to §430.008 of the Act and [~~10 TAC~~] Chapter 303, Subchapter D of this title, the commission, upon finding that an applicant for registration as a third-party warranty company is unqualified, shall deny the applicant's original or renewal application, or, if the certificate of registration has been issued, the certificate shall be administratively withdrawn.

(1) Grounds for disqualification may include the payment of a registration or renewal fee with a payment instrument, including a check, credit or debit card, or electronic funds transfer, that is returned due to insufficient funds or overdraft, whether before or after a registration certificate has been issued.

(2) The third-party warranty company shall be notified of the payment failure by certified mail to the applicant's last known business address of record with the commission.

(3) If full payment is not received within 15 calendar days from the date of receipt of the certified letter and the certificate of registration has been issued, applicant's registration shall be administratively withdrawn.

(h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804861

Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 463-3926

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SUBCHAPTER C. PROCEEDINGS AT SOAH

10 TAC §305.32

The Texas Residential Construction Commission (commission) proposes amendments to §305.32, regarding Default Proceedings.

The commission proposes amendments to the section in order to streamline the default process when the respondent has not responded to the initial Notice of Violation. The proposed amended rule is consistent with Texas Property Code §408.001, and Texas Government Code §§2001.051, 2001.054 and 2001.056.

Presently the commission has no specific provision for defaults in cases when there has been no response by the respondent to the notice of violation in the commission rules; therefore, the commission must rely on the State Office of Administrative Hearings (SOAH) rules to bring a close to a case with a recalcitrant respondent who refuses to respond. This requires the case to be set for hearing at SOAH which includes a 30 day wait for the hearing. Then when the respondent fails to appear at the hearing and a default is requested by the commission attorney, the Administrative Law Judge has 60 days to recommend the default or not to the commission and the commission must expend funds to appear before SOAH. With this rule, the commission may set the default directly with the commission eliminating as much as 90 days from the process and freeing the SOAH docket and the commission attorney from unnecessary duties and the commission from unnecessary administrative expense, but still affording the respondent the right to a hearing should he make an appearance.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period that the proposed amendments are in effect there will be no fiscal implications for local governments as a result of enforcing or administering the amended section. There will be a fiscal impact on state government to the extent that there will be a savings of time and effort at both SOAH and the commission and a savings to the commission on costs expended for litigation conducted at SOAH.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect the public will benefit from savings of state resources currently expended on default proceedings against persons who do not respond to commission contact regarding violations of laws and rules under the commission's purview.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no significant effect on individuals or large, small, or micro-businesses as a result of the adoption of the amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will not be an adverse economic effect on small businesses. Therefore, no regulatory flexibility analysis is necessary.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711-3509. Comments may be submitted electronically to comments@trcc.state.tx.us or by fax to (512) 475-2453. For comments submitted electronically, please include "Default Rule" with the rule number in the subject line. Comments should be organized in a manner consistent with the organization of the proposed amended rule. The deadline for submission of comments is 30 days from the date of publication of the proposed amendments in the *Texas Register*. Comments received after that deadline submission date or comments submitted electronically without "Default Rule" with the rule number in the subject line may not be considered.

The amendments are proposed under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code; Texas Government Code §2001.051, which provides that parties to a contested case are entitled to notice and an opportunity for hearing, §2001.054, which provides that a revocation, suspension, annulment or withdrawal of a license is not effective unless before the institution of state agency proceedings the agency gives notice to the license holder of the alleged violation supporting the intended action, and the license holder is given an opportunity to show compliance with all the requirements of law for the retention of the license and §2001.056, which allows for disposition of a contested case by default. The amendments are also proposed pursuant to the Texas Government Code §§2001.021 - 2001.039, especially §2001.039.

No other statutes, articles, or codes are affected by the proposal.

§305.32. Default Proceedings Rule.

(a) If, within 20 days after receiving a Notice of Violation, the Respondent fails to accept the commission's determination and recommended administrative penalty and/or sanction, or fails to make a written request for a hearing on the determination, the commission may propose entry of a default order against the Respondent unless otherwise provided by applicable law. [~~If, after proper notice, a respondent in a contested case fails to appear, commission staff may move to either dismiss the case from SOAH's docket or to request a default proposal for decision in which the allegations in the notice of hearing will be deemed admitted as true.~~]

(b) Where a Respondent fails to answer the Notice of Violation, the commission may present to the Commission a motion for default order along with a proposed default order containing findings of fact and conclusions of law. Respondents will be notified as required by law as to the time and place the motion for default order will be considered. If a Respondent attends at the time and place prescribed in the notice, an administrative hearing may be set in accordance with §305.28 of this chapter.

(c) After receiving a notice proposing denial of an application under §303.21 of this title, an applicant may request an appeal in writing within 30 days of receipt of the notice or forfeit the right to a hearing unless otherwise provided by applicable law as provided in §303.23 of this title.

(d) 1 TAC §155.55 (SOAH Rules) applies where a Respondent fails to appear on the day and time set for an administrative hearing. In that case, the commission's staff may move either for dismissal of the

case from SOAH's docket or for the issuance of a default proposal for decision by the judge.

(e) Any document served upon a party is prima facie evidence of receipt if it is directed to the party's last known complete, correct address as shown by the commission's records. This presumption is rebuttal. Failure to claim properly addressed certified or registered mail will not support a finding of non-delivery.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-3926

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CHAPTER 307. INSPECTIONS OF HOMES IN AREAS WITHOUT MUNICIPAL INSPECTIONS

10 TAC §307.4

The Texas Residential Construction Commission (commission) proposes an amendment to §307.4, regarding reporting requirements for inspections of residential construction in areas not subject to municipal inspections. The proposed amendment corrects a typographical error and clarifies the name of the certificate of compliance that must be submitted when a builder or remodeler registers a home with the commission and when the builder or remodeler is required by statute or rule to obtain a windstorm WPI-8 certificate of compliance in accordance with the requirements of Insurance Code §2210.251. The proposed amendment implements new legislation enacted during the 80th Legislative Session, Regular Session, House Bill 1038 (Act effective September 1, 2007, 80th Legislature, Regular Session), which includes changes to Title 16 of the Property Code.

Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amendment is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the amended rule.

Ms. Durso has also determined that for the first five years the proposed amendment is in effect the public will benefit from the clarification because residences will be built to the current codes and standards of the state. There is no anticipated economic cost to small businesses or persons who are required to comply with the proposed amendment.

Ms. Durso has also determined that for each year of the first five-year period the amendment is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect there will be no adverse economic effect on small businesses. Therefore, no regulatory flexibility analysis is necessary.

Comments on the proposed amendment may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Section 307.4 Amendment" in the subject line. The deadline for submission of comments is 30 days from the date of publication of the proposed amendment in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the amended rule under consideration.

The amendment is proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code; Property Code §446.001, which gives the commission the authority to inspect homes in unincorporated areas and the commission's enabling act; and the Administrative Procedures Act, Texas Government Code, Chapter 2001.

No other statutes, articles, or codes are affected by the proposed amendment.

§307.4. Reporting.

(a) - (c) (No change.)

(d) When registering a home subject to the inspection requirements of this chapter, a builder or remodeler will provide the unique project number it assigned to the property and provided to the fee inspector and, if required by statute to obtain a certificate of compliance under §307.2 of this chapter, will report the Windstorm WPI-8 [~~WI-8~~] certificate of compliance number at the time the home is registered.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804860
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 463-3926

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §5.9, §5.10

The Texas Higher Education Coordinating Board proposes new §5.9 and §5.10, concerning Conversion Chart for the Uniform Grade Point Average and Implementation of Uniform Grade Point Average Rules. Specifically, the Conversion Chart will establish the mathematical equivalences for the standard method for computing a student's high school grade point average established by §5.8, and the implementation rule will establish the time-table for the implementation of §5.8.

Dr. Judith Loredo, Assistant Commissioner for P-16 Initiatives, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Loredo has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be increased student success and graduation from general academic teaching institutions. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Natalie Coffey, Senior Program Director, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or natalie.coffey@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §51.807, which requires the Coordinating Board to adopt rules establishing a standard method for computing a student's high school grade point average.

The new sections affect Texas Education Code, §51.807.

§5.9. Conversion Chart for Uniform Grade Point Average.

The following conversion chart shall be used in the calculation of grade point averages pursuant to §5.8 of this subchapter (relating to Uniform Grade-Point Average Calculation for Admission to General Academic Teaching Institutions):
Figure: 19 TAC §5.9

§5.10. Implementation of Uniform Grade Point Average Rules.

(a) The rules for calculation of the Uniform Grade Point Average established under §5.8 of this subchapter (relating to Uniform Grade-Point Average Calculation for Admission to General Academic Teaching Institutions) shall apply to the calculation of such averages for all students who enter the ninth grade for the first time from May 1, 2009, onward.

(b) The grade point averages of students already in ninth grade or higher as of April 30, 2009, or before, shall be calculated on the same basis that would have applied to such students before the adoption of §5.8 of this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804856

Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 165. MEDICAL RECORDS

22 TAC §165.1, §165.5

The Texas Medical Board proposes amendments to §165.1, concerning Medical Records, and §165.5, concerning Transfer and Disposal of Medical Records.

The amendment to §165.1 clarifies that a physician must destroy medical records after the required time for maintenance in a manner that ensures continued confidentiality.

The amendment to §165.5 clarifies when a physician must notify the board of termination, retirement, or relocation of practice and clarifies that the notice to patients must offer the patient the opportunity to obtain a copy of the patient's medical records or have those medical records transferred to another physician.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes the rule review of Chapter 165.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to assure patients of the confidentiality of their medical records and to clarify the notice to the Board and notice to patients.

The effect on small or micro businesses will be that physicians and physician owned corporations may incur expense in the destruction of patient medical records in a manner that assures the confidentiality of the records.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§165.1. Medical Records.

(a) (No change.)

(b) Maintenance of Medical Records.

(1) - (6) (No change.)

(7) Destruction of medical records shall be done in a manner that ensures continued confidentiality.

§165.5. Transfer and Disposal of Medical Records.

(a) Required Notification of Discontinuance of Practice. When a physician retires, terminates employment or otherwise leaves a medical practice, he or she is responsible for:

(1) (No change.)

(2) notifying the board when they are terminating practice, retiring, or relocating, and therefore no longer available to patients, specifying who has custodianship of the records, and how the medical records may be obtained.

(3) Employers of the departing physician as described in [~~Section~~] §165.1(b)(6) of this chapter are not required to provide notification, however, the departing physician remains responsible, for providing notification consistent with this section.

(b) Method of Notification.

(1) When a physician retires, terminates employment, or otherwise leaves a medical practice, he or she shall provide notice to patients of when the physician intends to terminate the practice, retire or relocate, and will no longer be available to patients, and offer patients the opportunity to obtain a copy of their medical records or have their records transferred.

(2) - (4) (No change.)

(c) (No change.)

(d) Voluntary Surrender or Revocation of Physician's License.

(1) Physicians who have voluntarily surrendered their licenses [~~in lieu of disciplinary action~~] or have had their licenses revoked by the board must notify their patients, consistent with subsection (b) of this section, within 30 days of the effective date of the voluntary surrender or revocation.

(2) Physicians who have voluntarily surrendered their licenses [~~in lieu of disciplinary action~~] or have had their licenses revoked by the board must obtain a custodian for their records to be approved by the board within 30 days of the effective date of the voluntary surrender or revocation.

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
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CHAPTER 169. AUTHORITY OF PHYSICIANS TO SUPPLY DRUGS

22 TAC §169.7

The Texas Medical Board proposes amendments to §169.7, concerning Record Keeping.

The amendment to §169.7 provides clarifying references to rules of the Department of Public Safety.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes the rule review of Chapter 169.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to update the rule.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§169.7. Record Keeping.

(a) (No change.)

(b) The following provisions relate to controlled substances.

(1) A licensee shall be presumed to have complied with record keeping requirements for controlled substances (the Texas Health and Safety Code, Chapter 481) received as pharmaceutical samples if:

(A) (No change.)

(B) the licensee maintains records of pharmaceutical samples as required by the Texas Department of Public Safety under 37 TAC §§13.201 - 13.209 (Controlled Substances - Record Keeping) [~~§13.202-.207, (Receipt or Distribution of Controlled Substances)~~].

(2) A licensee shall be presumed to have complied with the record keeping requirements for controlled substances (the Texas Health and Safety Code, Chapter 481) received or acquired other than as a pharmaceutical sample if the licensee maintains records of such controlled substances as required by 37 TAC §§13.201 - 13.209 [~~section 13.28, Texas Department of Public Safety~~], controlled substance regulations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 178. COMPLAINTS

22 TAC §178.1

The Texas Medical Board proposes amendments to §178.1, concerning Purpose and Scope.

The amendment to §178.1 specifies statutory authority for the board to adopt rules regarding complaints.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes the rule review of Chapter 178.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to clarify the Board's authority to adopt rules regarding complaints.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§178.1. Purpose and Scope.

(a) Purpose. Pursuant to §§154.051 - 154.058 of the Medical Practice Act, the Board is authorized to adopt rules relating to complaint procedures. The purpose of this chapter is to provide a system of procedures for the initiation, filing and appeals of complaints that will promote their just and efficient disposition.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 179. INVESTIGATIONS

22 TAC §§179.1, 179.4, 179.6

The Texas Medical Board proposes amendments to §179.1, concerning Purpose and Scope, §179.4, concerning Request for Information and Records from Physicians and §179.6, concerning Time Limits.

The amendment to §179.1 specifies statutory authority for the board to adopt rules regarding investigations.

The amendment to §179.4 adds a provision specifying that probable cause to obtain a licensee's medical records may be shown by actions or statements by a licensee at a hearing conducted by the Board that gives the Board reason to believe that the licensee has an impairment.

The amendment to §179.6 provides that a decision by the Quality Assurance Committee or the Disciplinary Process Review Committee that there is a necessity for additional investigation of a complaint constitutes good cause for an investigation to extend beyond 180 days.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes the rule review of Chapter 179.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to clarity the Board's authority to adopt rules regarding investigations, to give the Board added opportunity to require a licensee to submit medical records when the conduct of the licensee raises issues that the licensee may be impaired, and to allow the Board to take more time to investigate a matter when the Quality Assurance Committee or the Disciplinary Process Review Committee determines that additional time is necessary for a thorough investigation.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§179.1. Purpose and Scope.

(a) Purpose. Pursuant to §154.056 of the Medical Practice Act, the Board is authorized to adopt rules relating to the investigation of complaints filed with the Board. The purpose of this chapter is to provide a system of procedures for the investigation of jurisdictional complaints that will promote their just and efficient disposition.

(b) (No change.)

§179.4. Request for Information and Records from Physicians.

(a) - (b) (No change.)

(c) Impaired licensees.

(1) (No change.)

(2) If the board has probable cause to believe that a licensee is impaired, the board shall require a licensee to submit to a mental and/or physical examination by a physician or physicians designated by the board. Under the Act, an impaired licensee is considered to be one who is unable to practice within his field with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material; or as a result of any mental or physical condition. Probable cause may include, but is not limited to, any one of the following:

(A) - (E) (No change.)

(F) evidence of recurring temporary commitments to a mental institution of a licensee; [~~or~~]

(G) medical records showing that a licensee has an illness or condition that results in the inability to function properly in his or her practice; or [~~.~~]

(H) actions or statements by a licensee at a hearing conducted by the Board that gives the Board reason to believe that the licensee has an impairment.

(d) - (e) (No change.)

§179.6. Time Limits.

(a) Each investigation shall be completed before the passage of the 180th day after the complaint has been filed and an official investigation opened, unless there is good cause as to why the investigation could not be completed within that time. Good cause shall include, but shall not be limited to:

(1) - (4) (No change.)

(5) the necessity of additional investigation as determined by the Board's internal Quality Assurance Committee or DPRC;

(6) - (7) (No change.)

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 180. REHABILITATION ORDERS

22 TAC §180.1

The Texas Medical Board proposes an amendment to §180.1, concerning Rehabilitation Orders.

The amendment to §180.1 corrects a reference to this "section" instead of this "chapter."

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes the rule review of Chapter 180.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to clarify the rule by correcting the reference to this section.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§180.1. Rehabilitation Orders.

(a) - (b) (No change.)

(c) Eligibility for rehabilitation order. The board may issue a rehabilitation order for a licensee or applicant, as a prerequisite for issuing a license, for the following reasons:

(1) (No change.)

(2) the licensee or applicant self-reported intemperate use of drugs or alcohol as set out in subsection (f) of this section [~~chapter~~], and has not previously been the subject of a substance abuse-related order of the board;

(3) - (5) (No change.)

(d) - (e) (No change.)

(f) Requirements for self-reports. To be eligible for a rehabilitation order based on a self-report of intemperate use of drugs or alcohol:

(1) - (4) (No change.)

(5) self-reports [~~Self-reports~~] of intemperate use of drugs or alcohol by licensees or applicants must be made through a written statement by the licensee or applicant, or the authorized agent of the licensee or applicant, submitted to the board or board staff by mail, email, messenger, telefacsimile transmission, or hand-delivery. The self-report may be made through responses provided as part of an application for a license or writing submitted for purposes of licensure renewal; and[~~.~~]

(6) (No change.)

(g) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 182. USE OF EXPERTS

22 TAC §§182.1, 182.5, 182.8

The Texas Medical Board proposes amendments to §182.1, concerning Purpose, §182.5, concerning Expert Panel, and §182.8, concerning Expert Physician Reviewers.

The amendment to §182.1 specifies statutory authority for the board to adopt rules regarding experts.

The amendment to §182.5 specifies that members of the Expert Physician Panel may only be appointed by the board.

The amendment to §182.8 clarifies that, in determining the same or similar specialty of a physician, the practice area or specialty declared by the subject physician as his area of practice may be the specialty of the expert reviewers.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes the rule review of Chapter 182.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to clarify the statutory authority for the board to adopt rules regarding experts, to assure that members of the Expert Physician Panel may only be appointed by the board, and to provide greater assurance that quality of care cases are reviewed by expert reviewers who are trained and qualified to render an expert opinion regarding the practice of a licensee who is the subject of an investigation.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§182.1. Purpose.

Pursuant to §§154.056 - 154.0561 of the Medical Practice Act, the board is authorized to adopt rules relating to the use of expert physicians in the review of complaints involving medical competency. This chapter is promulgated to establish procedures, qualifications and duties of those professionals serving as expert panel members, consultants and expert witnesses to the board.

§182.5. Expert Panel.

(a) Physicians may be appointed by the board to the Expert Panel as follows:

(1) (No change.)

(2) Qualifications. To be eligible to serve on the Expert Panel, a physician must meet the following criteria:

(A) licensed to practice medicine in Texas;

(B) - (F) (No change.)

(b) - (c) (No change.)

§182.8. Expert Physician Reviewers.

(a) Selection of Reviewers. Any complaint alleging a possible violation of the standard of care will be referred to Expert Physician Reviewers who will review all the medical information and records collected by the board and shall report findings in the prescribed format.

(1) Reviewers shall be randomly selected from among those Expert Panel members who practice in the same specialty as the physician who is the subject of the complaint. The practice area or specialty declared by the subject physician as his area of practice may be the specialty of the expert reviewers.

(2) - (4) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 187. PROCEDURAL RULES

The Texas Medical Board proposes amendments to §§187.3, 187.4, 187.13, 187.14, 187.18, 187.24, 187.29, 187.59 and 187.70 - 187.73, concerning Procedural Rules.

The amendment to §187.3 clarifies that requirements regarding the computation of time may be made by statute or rule.

The amendment to §187.4 modernizes language used in the rule.

The amendment to §187.13 adds a reference to Chapter 172, and updates the term "Licensure with Restrictions" to "Licensure with "terms and conditions".

The amendment to §187.14 deletes "Administrative" as a modifier regarding informal resolution of violations.

The amendment to §187.18 recognizes right of a complainant to make a statement in an informal show compliance and settlement conference and clarifies alternatives that an ISC Panel may consider, adding recommendation of imposition of administrative penalty.

The amendment to §187.24 updates the name of the agency to Texas Medical Board.

The amendment to §187.29 clarifies abbreviation used in the rule.

The amendment to §187.59 adds additional language used in §2001.081, Texas Government Code.

The amendment to §187.70 adds, as a purpose of the rule regarding suspension by operation of law, the initial conviction of certain offenses.

The amendment to §187.71 adds conviction of certain offenses as a basis for a panel of the board ordering suspension by operation of law.

The amendment to §187.72 adds conviction of certain offenses as a basis for a panel of the board ordering suspension by operation of law.

The amendment to §187.73 requires a person who has been suspended by operation of law to show competence and safety to practice medicine as a requirement for terminating suspension.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes the rule review of Chapter 187.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to clarify questions regarding the computation of time if the statute does not adequately clarify the issue, to bring the language of the rule up to date, to clarify the rule by providing a reference to Chapter 172 of the Board's Rules and provides a more precise term for issuing a license with an order, to eliminate the term "Administrative," which may be confusing in view of the Board adoption of a rule regarding the imposition of an administrative penalty, to assure that a complainant is treated equally with any other witness at an ISC and to recognize the Board's new rule regarding the imposition of an administrative penalty, to update the name of the agency, to clarify the rule by stating the full name of an item previously abbreviated, to provide the full text of the test for additional admissible evidence, and provided by the Administrative Procedure Act, to allow the Board to expeditiously enforce the statute that requires the Board to suspend a licensee's license upon initial conviction of certain crimes, to allow the Board to expeditiously enforce the statute that requires the Board to suspend a licensee's license upon initial conviction of certain crimes, to expeditiously enforce the statute that requires the Board to suspend a licensee's license upon initial conviction of certain crimes, and to assure that a licensee who has been suspended by operation of law will show that the licensee is competent and safe to practice medicine before the suspension may be terminated.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

22 TAC §187.3, §187.4

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§187.3. Computation of Time.

(a) Counting days. Unless otherwise required by statute, in computing time periods prescribed by this chapter or by a State Office of Administrative Hearings (SOAH) [~~SOAH~~] order, the period shall begin to run on the day after the act, event or default in question. The day of the act, event or default on which the designated period time begins to run is not included. The period shall conclude on the last day of the designated period, unless that day is a day the agency is not open for business, in which case the designated period runs until the end of the next day on which the agency is open for business. When these rules specify a deadline or a set number of days for filing documents or taking other actions, the computation of time shall be calendar days rather than business days, unless otherwise provided in this chapter or pursuant to a SOAH or board order. However, if the period to act is five days or less, the intervening Saturdays, Sundays and legal holidays are not counted.

(b) (No change.)

(c) Extensions. Unless otherwise provided by statute or rule, the time for filing any document may be extended by agreement of the parties, order of the executive director or the Administrative Law Judge (ALJ) [~~ALJ~~] if SOAH has acquired jurisdiction, upon written request filed prior to the expiration of the applicable time period. This written request must show good cause for an extension of time and state that the need is not caused by the neglect, indifference or lack of diligence of the movant.

§187.4. Agreement to be in Writing.

No stipulation or agreement between the parties, with regard to any matter involved in any board proceeding shall be enforced unless it has [~~shall have~~] been reduced to writing and agreed to by the parties or their authorized representatives, or unless it has [~~shall have~~] been dictated into the record by them during the course of a State Office of Administrative Hearings (SOAH) [~~SOAH~~] hearing, deposition, or other proceeding of record, or incorporated in a motion bearing their written approval. This section does not limit a party's ability to waive, modify or stipulate any right or privilege.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §§187.13, 187.14, 187.18

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§187.13. Informal Board Proceedings Relating to Licensure Eligibility.

(a) Recommendations by the Executive Director.

(1) The executive director shall review applications for licensure and may determine whether an applicant is eligible for licensure or refer an application to a committee of the board for review. If an applicant is determined to be ineligible for a license by the executive director pursuant to §§155.001 - 155.152 of the Act, Chapter 163 of this title (relating to Licensure), [~~or~~] Chapter 171 of this title (relating to Postgraduate Training Permits), or Chapter 172 of this title (relating to Temporary and Limited Licenses) the applicant may request review of that determination by a committee of the board. The applicant must request the review not later than the 20th day after the date the applicant receives notice of the determination.

(2) (No change.)

(b) Determination by a Committee of the Board. Upon review of an application for licensure, a committee of the board may determine that the applicant is ineligible for licensure or is eligible for licensure with or without restrictions, or defer its decision pending further information.

(1) Licensure with Terms and Conditions [~~Restrictions~~].

(A) If the committee determines that the applicant should be granted a license under certain terms and conditions [~~with restrictions~~] based on the applicant's commission of a prohibited act or failure to demonstrate compliance with provisions under the Act or board rules, the committee, as the board's representatives, shall propose an agreed order. The terms and conditions of the proposed agreed order shall be submitted to the board for approval. The agreed order shall be considered nondisciplinary.

(B) - (C) (No change.)

(2) Ineligibility Determination.

(A) If a committee of the board or the full board determines that an applicant is ineligible for licensure, the applicant shall be notified of the committee's determination and given the option of appealing the determination to State Office of Administrative Hearings (SOAH) [~~SOAH~~] or withdrawing the application. An applicant has 20 days from the date the applicant receives notice of the committee's determination to make the request.

(B) - (D) (No change.)

§187.14. Informal Resolution of Disciplinary Issues Against a Licensee.

Pursuant to §§164.003 - 164.004 [~~.004~~] of the Act and §§2001.054 - 2001.056 [~~.056~~] of the Administrative Procedure Act (APA) [~~APA~~], the following rules shall apply to informal resolution:

(1) - (5) (No change.)

(6) Any modification made by the board to any proposed agreed order before the initial effective date of the order must be approved by the licensee.

(7) Informal Resolution of [~~Administrative~~] Violations.

(A) - (C) (No change.)

(D) If the QA Committee determines that an offer of settlement should be made regarding a complaint that does not relate directly to patient care, the offer of settlement shall be presented to the licensee.

(i) (No change.)

(ii) If the licensee fails to timely accept the offer of settlement, or if the licensee requests that an Informal Settlement Conference (ISC) [~~ISC~~] be held, the offer shall be deemed to be rejected and an ISC shall be scheduled.

§187.18. Informal Show Compliance Proceeding and Settlement Conference Based on Personal Appearance.

(a) After referral of an investigation to the agency's legal division, the Hearings Coordinator of the board shall schedule an Informal Settlement Conference (ISC) [~~ISC~~] before an ISC Panel, composed of two or more board representatives to be held after proper notice to the licensee. One board representative must be a public member. If the matter is before the Medical Board, at least one board representative must be a physician member.

(b) Requests to reschedule the ISC by a licensee must be in writing and shall be referred to the Hearings Counsel for consideration. To avoid undue disruption of the ISC schedule, the Hearings Counsel should grant a request only after conferring with the Hearings Coordinator and consideration of the following guidelines:

(1) - (2) (No change.)

(3) A request based on the failure of the agency to send notice at least 30 days before the date of the ISC, as required by [~~Section~~] §164.003 of the Act, shall be granted, provided the request is received by the agency within five business days after the late notice is received by the licensee.

(c) - (f) (No change.)

(g) Notwithstanding subsection (f) of this section, the board representatives may allow a complainant or witness to testify outside the physical presence of the licensee to protect the person from harassment and/or undue embarrassment, for personal safety concerns, or for any other demonstrated and legitimate need. If such testimony is allowed, arrangements will be made to allow the licensee to listen to the testimony contemporaneously as it is given.

(h) - (n) (No change.)

(o) The board representatives may:

(1) - (3) (No change.)

(4) direct that a formal Complaint be filed with State Office of Administrative Hearings (SOAH) [~~SOAH , if the ISC Panel determines that no agreed settlement is likely to be successful~~]; [~~or~~]

(5) recommend to the President of the board that a Disciplinary Panel be convened to consider the temporary suspension or restriction of the licensee's license ; or [~~, if the ISC Panel determines that the licensee poses a continuing threat to the public welfare.~~]

(6) recommend the imposition of an administrative penalty pursuant to §§187.75 - 187.82 of this chapter (relating to Procedural Rules).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. FORMAL BOARD PROCEEDINGS AT SOAH

22 TAC §187.24, §187.29

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§187.24. Pleadings.

(a) In disciplinary matters, actions by the board as Petitioner against a licensee, the board's pleadings shall be styled "Complaint" or "Formal Complaint". Except in cases of temporary suspension, a Complaint shall be filed only after notice of the facts or conduct alleged to warrant the intended action has been sent to the licensee's address of record and the licensee has an opportunity to show compliance with the law for the retention of a license as provided in §2001.054 of the Administrative Procedure Act (APA) [~~APA~~], and §164.004(a) of the Act.

(b) In nondisciplinary matters, actions by the board as petitioner to enforce and regulate matters regarding licensure eligibility, the board's pleadings shall be styled "Petition of the Texas Medical Board [~~of Medical Examiners~~]".

§187.29. Mediated Settlement Conferences.

(a) In an effort to expeditiously resolve disputed issues, mediation may be held through State Office of Administrative Hearings (SOAH) [~~SOAH~~] in compliance with §155.37 of SOAH rules.

(1) Board members and District Review Committee (DRC) members are not parties to actions pending before SOAH, and accordingly will not be ordered or expected to attend Mediated Settlement Conferences (MSCs) [~~MSCs~~] before SOAH. Board members and DRC members who attended the informal show compliance proceeding or Licensure Committee hearing will be invited by board staff to attend the MSC. If the board and DRC members who attended the informal show compliance proceeding, or the Licensure Committee members are unable to attend the MSC, then other members of the board and DRC may be invited to attend the MSC. In appropriate cases, board staff will make every effort to have a physician-member present.

(2) - (3) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
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For further information, please call: (512) 305-7016

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SUBCHAPTER F. TEMPORARY SUSPENSION PROCEEDINGS

22 TAC §187.59

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§187.59. Evidence.

(a) In accordance with the Administrative Procedure Act (APA) [~~APA~~], §2001.081, the determination of the disciplinary panel may be based not only on evidence admissible under the Texas Rules of Evidence, but may be based on information of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs, necessary to ascertain facts not reasonably susceptive of proof under those rules, and not precluded by statute.

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. SUSPENSION BY OPERATION OF LAW

22 TAC §§187.70 - 187.73

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§187.70. Purposes and Construction.

The purpose of this subchapter is to set forth a procedure for the suspension of a medical license in the case of initial conviction of certain offenses or the incarceration of a physician in a state or federal penitentiary, as provided in §§164.057 - 164.058 [~~§164.058~~] of the Act [~~("incarceration")~~]. The board interprets this statute as providing for suspension by operation of law and that an initial conviction occurs when there has been adjudication of guilt of the offense charged. Since the board's role in such circumstances is limited to whether the licensee has been initially convicted of certain offenses or is incarcerated, the board has determined that the procedures set forth in this subchapter will provide due process to the licensee and protect the public.

§187.71. Hearing before a Panel of Board Representatives.

(a) Upon receipt of information that a licensee has been initially convicted of certain offenses or is incarcerated, the board shall schedule a hearing before a panel of board representatives at the earliest practicable time after providing the licensee with at least ten days notice.

(b) The panel shall be composed of at least two members of the board or [~~and~~] District Review Committee. At least one member must be a physician and one member must be a public member. The panel may be the same panel that is scheduled for Informal Show Cause and Settlement Conferences.

(c) - (d) (No change.)

(e) If the licensee disputes the fact that the licensee has been initially convicted of the offense or that the licensee is incarcerated, the licensee may present evidence or information [~~showing that the licensee has not been incarcerated~~]. If the licensee admits that the licensee has been initially convicted of an offense or is incarcerated, but requests that the panel probate an order suspending the licensee's medical license, the licensee may present evidence or information showing that probation is authorized by §164.101 and §164.102 of the Act and that the suspension should be probated.

(f) A licensee shall be subject to further disciplinary action when a final conviction of the offense occurs pursuant to §164.051(a)(2) and §164.057(b) of the Act. A final conviction occurs when there has been an adjudication of guilt and a judgment entered.

§187.72. Decision of the Panel.

(a) If the panel determines that the licensee has been initially convicted of an offense or is incarcerated, but does not determine that the suspension should be probated, the panel shall direct the Executive Director to enter an order suspending the medical license of the licensee in accordance with §164.057 or §164.058 of the Act. Because the Act requires suspension, the board has determined that an imminent peril to the public health, safety, or welfare requires immediate effect and the order of the Executive Director shall be effective and final immediately upon entry.

(b) (No change.)

§187.73. Termination of Suspension.

Suspension may be terminated upon request by the licensee after an appearance at an Informal Settlement Conference (ISC) at which time the licensee must demonstrate physical and mental competence to practice medicine and that the licensee is otherwise safe to practice medicine [~~and proof that the licensee is no longer incarcerated~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Medical Board
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CHAPTER 190. DISCIPLINARY GUIDELINES

The Texas Medical Board proposes amendments to §190.1, concerning Purpose, §190.8, concerning Violation Guidelines, and §190.14, concerning Sanction Guidelines.

The amendment to §190.1 adds reference to statutory authority for the board to adopt rules regarding disciplinary guidelines.

The amendment to §190.8 specifies what constitutes reasonable notice of the termination of the physician-patient relationship.

The amendment to §190.14 updates sanction guidelines to follow sanctions approved for the imposition of administrative penalties.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes the rule review of Chapter 190.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to clarify the authority of the Board to adopt rules regarding disciplinary guidelines, to clarify the reasonable notice to a patient of the termination of the patient-physician relationship is thirty days or otherwise consented to by the patient, and to set forth in rule the various violations that may be subject to the imposition of an administrative penalty.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §190.1

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate

the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§190.1. Purpose.

(a) Purpose. This chapter is promulgated to:

(1) promote consistency in the exercise of sound discretion by board members in licensure and disciplinary matters;

(2) provide guidance for board members for the resolution of potentially contested matters; and

(3) provide guidance as to the types of conduct that constitute violations of the Medical Practice Act (the "Act") or board rules.

(b) Authority. Pursuant to §§164.001 - 164.103, the Board may adopt rules relating to its disciplinary authority to take action against a licensee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. VIOLATION GUIDELINES

22 TAC §190.8

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§190.8. Violation Guidelines.

When substantiated by credible evidence, the following acts, practices, and conduct are considered to be violations of the Act. The following shall not be considered an exhaustive or exclusive listing.

(1) Practice Inconsistent with Public Health and Welfare. Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the Act includes, but is not limited to:

(A) - (I) (No change.)

(J) termination of patient care without providing reasonable notice to the patient of at least 30 days or otherwise obtaining the patient's consent to termination of care;

(K) - (N) (No change.)

(2) - (3) (No change.)

(4) Disciplinary actions by peer groups. A voluntary relinquishment of privileges or a failure to renew privileges with a hospital, medical staff, or medical association or society while an investigation or a disciplinary action is pending or is on appeal constitutes disciplinary action that is appropriate and reasonably supported by evidence submitted to the board, within the meaning of section 164.051(a)(7) the Act.

(5) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. SANCTION GUIDELINES

22 TAC §190.14

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§190.14. Disciplinary Sanction Guidelines.

These disciplinary sanction guidelines are designed to provide guidance in assessing sanctions for violations of the Medical Practice Act. The ultimate purpose of disciplinary sanctions is to protect the public, deter future violations, offer opportunities for rehabilitation if appropriate, punish violators, and deter others from violations. These guidelines are intended to promote consistent sanctions for similar violations, facilitate timely resolution of cases, and encourage settlements.

(1) - (2) (No change.)

(3) The standard and minimum sanctions outlined below are based on the conclusion stated in Section 164.001(j) of the Act that a violation related directly to patient care is more serious than one that involves only an administrative violation. An administrative violation may be handled informally in accordance with Section 187.14(7) of this title (relating to Informal Resolutions of [~~Administrative~~] Violations). Administrative violations may be more or less serious, depending on the nature of the violation. Administrative violations that are considered by the board to be more serious are designated as being an "aggravated administrative violation".

(4) - (6) (No change.)

(7) The following standard sanctions shall apply to violations of the Act:

(A) Failure to timely provide copies of medical or billing records upon written request or overcharging for medical records is an administrative violation.

(i) Violation of:

(I) Section 159.006 - information furnished by licensee; and

(II) Section 164.052(a)(2) - violation of Board Rule, to wit: §165.2 (relating to Medical Record Release and Charges).

(ii) Standard Sanction:

[(I) ~~furnishing medical records requested;~~]

[(II) ~~restitution; and~~]

[(III)] administrative penalty of $1,000 per violation.

(B) Failure to timely comply with a board subpoena or request for information is an administrative violation.

(i) Violation of §160.009 and board rule §179.4 (relating to Request for Information and Records from Physicians).

(ii) Standard Sanction is an [~~:~~]

[(I) ~~public reprimand;~~]

[(II) ~~compliance with the subpoena or request; and~~]

[(III)] administrative penalty of $2,000 [~~$500 for each day of noncompliance~~].

(C) - (D) (No change.)

(E) Conviction of a misdemeanor that directly relates to the duties and responsibilities of the licensed occupation may be either an administrative violation or a patient care violation, depending on the facts underlying the offense.

(i) Violation of §53.021, Tex. Occ. Code.

(ii) Standard Sanction:

(I) If the offense involves patient care, the standard sanction shall be revocation of the license.

(II) If the offense does not involve patient care and is an administrative violation only, the standard sanction shall require:

[~~(-a-) compliance with all restrictions, conditions and terms imposed by any order of probation or deferred adjudication;~~]

(-a-) [~~(-b-)~~] public reprimand; and

(-b-) [~~(-c-)~~] an administrative penalty of $2,000 per violation.

(F) (No change.)

(G) Failure to obtain/document continuing medical education is an administrative violation.

(i) Violation of §164.051(a)(3) or violation of board rule §166.2 (relating to Continuing Medical Education).

(ii) Standard Sanction shall be an administrative penalty of:

(I) $500 if lacking 5 hours or less [~~directed CME~~]; [~~and~~]

(II) $1,000 if lacking 6 to 10 hours; or [~~administrative penalty of $1,000 per violation.~~]

(III) $2,000 if lacking more than 10 hours.

(H) - (Q) (No change.)

(R) Failure to report a health care liability claim is an administrative violation.

(i) Violation of §160.052(b) of the Act and §176.2 of this title (relating to Reporting Responsibilities).

(ii) Standard Sanction shall be $500 for each violation.

(S) Failure to notify the board of change in practice or mailing address is an administrative violation.

(i) Violation of §166.1(d) of this title (relating to Physician Registration).

(ii) Standard Sanction shall be $500.

(T) Failure to maintain drug logs as required by an agreed order is an administrative violation.

(i) Violation of §190.8(2)(A) of this title (relating to Violation Guidelines).

(ii) Standard sanction is $2,000.

(U) Failure to display a "Notice Concerning Complaints" sign as required by §178.3 of this title (relating to Complaint Procedure Notification) is an administrative violation.

(i) Violation of §178.3 of this title.

(ii) Standard sanction shall be $1,000.

(V) Use of misleading advertising with regard to board certification is an administrative violation.

(i) Violation of §164.4 of this title (relating to Board Certification).

(ii) Standard sanction shall be $500.

(W) Reporting false or misleading information on an initial application for licensure or for licensure renewal is an administrative violation.

(i) Violation of §164.052(a)(1) of the Act.

(ii) Standard Sanction is $1,000.

(X) [~~(R)~~] For any violation of the Act that is not specifically mentioned in this rule, the board shall apply a sanction that generally follows the spirit and scheme of the sanctions stated in subparagraphs (A) - (W) [~~(R)~~] of this paragraph.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 192. OFFICE-BASED ANESTHESIA SERVICES

22 TAC §192.2

The Texas Medical Board proposes an amendment to §192.2, concerning Provision of Anesthesia Services in Outpatient Settings.

The amendment to §192.2 will delete the requirement that a physician administering Level I anesthesia services have available pre-measured doses of epinephrine, atropine, adreno-corticoids, and antihistamines.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes the rule review of Chapter 192.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to remove the burdensome requirement that pre-measured doses of certain drugs be available in the case of Level I anesthesia services.

There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§192.2. Provision of Anesthesia Services in Outpatient Settings.

(a) - (b) (No change.)

(c) Standards for Anesthesia Services. The following standards are required for outpatient settings providing anesthesia services that are administered within two hours before an out patient procedure. If personnel and equipment meet the requirements of a higher level, lower level anesthesia services may also be provided.

(1) Level I services:

(A) (No change.)

(B) the following age-appropriate equipment must be present:

(i) (No change.)

(ii) oxygen; and

(iii) AED or other defibrillator.[; and]

[(iv) pre-measured doses of epinephrine, atropine, adreno-corticoids, and antihistamines.]

(2) - (4) (No change.)

(d) - (l) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §281.66

The Texas State Board of Pharmacy proposes amendments to §281.66, concerning Application for Reissuance or Removal of Restrictions of a License. The amendments, if adopted, clarify that the rules regarding reissuance of a license or registration or the removal of restrictions on a license or registration includes pharmacy technicians and rename the section Application for Reissuance or Removal of Restrictions of a License or Registration.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that only qualified individuals are allowed to practice pharmacy. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 30, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.66. Application for Reissuance or Removal of Restrictions of a License or Registration.

(a) A person whose pharmacy license, pharmacy technician registration, or license or registration to practice pharmacy has been canceled, revoked, or restricted, whether voluntary or by action of the board, may, after 12 months from the effective date of such cancella-

tion, revocation, or restriction, apply to the board for reinstatement or removal of the restriction of the license or registration.

(1) - (5) (No change.)

(b) The board may consider the following items in determining the reinstatement of an applicant's previously revoked or canceled license or registration [~~pharmacist license~~]:

(1) - (5) (No change.)

(6) offers of employment in pharmacy [~~as a pharmacist~~];

(7) (No change.)

(8) failure to comply with the provisions of the board order revoking or canceling the applicant's license or registration;

(9) - (10) (No change.)

(11) the gravity of the offense for which the applicant's license or registration was canceled, revoked, or restricted and the impact the offense had upon the public health, safety and welfare;

(12) the length of time since the applicant's license or registration was canceled, revoked or restricted, as a factor in determining whether the time period has been sufficient for the applicant to have rehabilitated himself/herself to be able to practice pharmacy in a manner consistent with the public health, safety and welfare;

(13) - (14) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.7, §283.8

The Texas State Board of Pharmacy proposes amendments to §283.7, concerning Examination Requirements, and §283.8, concerning Reciprocity Requirements. The amendments, if adopted, clarify that the Board may require individuals to submit the required information to perform a criminal background check including fingerprinting.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be to ensure that only qualified individuals are licensed as pharmacists. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with these sections.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas, 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 30, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and §411.084 of the Texas Government Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §411.084 of the Government Code gives the agency the authority to obtain criminal history information from the Federal Bureau of Investigations.

The statutes affected by these rules: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§283.7. Examination Requirements.

Each applicant for licensure by examination shall pass the Texas Pharmacy Jurisprudence Examination and the NAPLEX. The examination requirements shall be as follows:

(1) Prior to taking the required examination, the applicant [~~shall meet~~]:

(A) shall meet the educational and age requirements as set forth in §283.3 of this title (relating to Educational and Age Requirements); and

(B) may be required to meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs.

(2) - (9) (No change.)

§283.8. Reciprocity Requirements.

(a) All applicants for licensure by reciprocity [~~shall~~]:

(1) shall meet the educational and age requirements specified in §283.3 of this title (relating to Educational and Age Requirements);

(2) may be required to meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs;

(3) shall complete the Texas and NABP applications for reciprocity. (Any fraudulent statement made in the application for reciprocity is grounds for denial of the application; if such application is granted, any fraudulent statement is grounds for suspension, revocation, and/or cancellation of any license so granted by the board);

(4) shall present to the board proof of initial licensing by examination and proof that their current license and any other license or licenses granted to the applicant by any other state have not been suspended, revoked, canceled, surrendered, or otherwise restricted for any reason; and

(5) shall pass the Texas Pharmacy Jurisprudence Examination with a minimum grade of 75. (The passing grade may be used for the purpose of licensure by reciprocity for a period of two years from the date of passing the examination.) Should the applicant fail to achieve a minimum grade of 75 on the Texas Pharmacy Jurisprudence Examination, such applicant, in order to be licensed, shall retake the

Texas Pharmacy Jurisprudence Examination as specified in §283.11 of this title (relating to Examination Retake Requirements) until such time as a minimum grade of 75 is achieved.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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CHAPTER 291. PHARMACIES
SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy proposes amendments to §291.33, concerning Operational Standards. The amendments, if adopted, remove the storage of drugs requirements from this section and locate the requirements in new §291.15 previously adopted by the Board.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that the storage of drugs is consistent with other classes of pharmacies and USP guidelines. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 30, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) - (e) (No change.)

(f) Drugs.

(1) Procurement and storage.

(A) - (B) (No change.)

(C) All drugs shall be stored at the proper temperature, as defined in the USP/NF and §291.15 of this title (relating to Storage of Drugs). [~~by the following terms:~~]

~~*[(i)* controlled room temperature--temperature maintained thermostatically between 15 degrees and 30 degrees Celsius (59 degrees and 86 degrees Fahrenheit);]~~

~~*[(ii)* cool--temperature between 8 degrees and 15 degrees Celsius (46 degrees and 59 degrees Fahrenheit) which may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling;]~~

~~*[(iii)* refrigerate--temperature maintained thermostatically between 2 degrees and 8 degrees Celsius (36 degrees and 46 degrees Fahrenheit); and]~~

~~*[(iv)* freeze--temperature maintained thermostatically between -20 degrees and -10 degrees Celsius (-4 degrees and 14 degrees Fahrenheit).]~~

(2) - (4) (No change.)

(g) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 305-8028

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CHAPTER 295. PHARMACISTS

22 TAC §295.8

The Texas State Board of Pharmacy proposes amendments to §295.8, concerning Continuing Education Requirements. The amendments, if adopted, clarify the procedures for pharmacists who have been licensed for 50 years wanting to return to the practice of pharmacy.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that only qualified individuals are licensed to practice pharmacy. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite

3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 30, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§295.8. Continuing Education Requirements.

(a) - (c) (No change.)

(d) Reporting Requirements.

(1) - (2) (No change.)

(3) Extension of time for reporting. A pharmacist who has had a physical disability, illness, or other extenuating circumstances which prohibits the pharmacist from obtaining continuing education credit during the preceding license period may be granted an extension of time to complete the continued education requirement. The following is applicable for this extension. [~~The board may grant an extension of time for a pharmacist to comply with the continuing education requirements. Such extension may be granted for good cause as follows:~~]

[~~(A) A pharmacist who has had a physical disability, illness, or other extenuating circumstances which prohibits the pharmacist from obtaining continuing education credit during the preceding license period may be granted an extension of time to complete the continued education requirement. The following is applicable for this extension.~~]

(A) [~~(i)~~] The pharmacist shall submit a petition to the board with his/her license renewal application which contains:

(i) [~~(I)~~] the name, address, and license number of the pharmacist;

(ii) [~~(II)~~] statement of the reason for the request for extension which includes the dates the pharmacist was incapacitated; and

(iii) [~~(III)~~] if the reason for the request for extension is health related, a statement from the attending physician(s) treating the pharmacist which includes the nature of the physical disability or illness and the dates the pharmacist was incapacitated.

(B) [~~(ii)~~] After review and approval of the petition, a pharmacist may be granted an extension of time to comply with the continuing education requirement which shall not exceed one license renewal period.

(C) [~~(iii)~~] An extension of time to complete continuing education credit does not relieve a pharmacist from the continuing education requirement during the current license period.

(D) [~~(iv)~~] If a petition for extension to the reporting period for continuing education is denied, the pharmacist shall:

(i) [~~(I)~~] have 60 days to complete and report completion of the required continuing education requirements; and

(ii) [~~(II)~~] be subject to the requirements of paragraph (2) of this subsection relating to failure to report completion of the required continuing education if the required continuing education is not completed and reported within the required 60-day time period.

[~~(B) Pharmacists who have been licensed for 50 years are subject to the following.~~]

[~~(i)~~ ~~Pharmacists who are actively practicing pharmacy shall complete the continuing education requirements in order to renew their license.~~]

[~~(ii)~~ ~~Pharmacists who are not actively practicing pharmacy shall be granted an indefinite extension to the reporting requirement for continuing education provided the pharmacists submit a completed renewal application for each license period which states that they are not practicing pharmacy. Upon submission of the completed renewal application, the pharmacist shall be issued a renewal certificate which states that pharmacist is inactive.~~]

[~~(iii)~~ ~~Pharmacists who wish to return to the practice after being granted an extension to the continuing education requirements as specified in clause (ii) of this subparagraph must:~~]

[~~(I)~~ ~~notify the board of their intent to actively practice pharmacy;~~]

[~~(II)~~ ~~pay the licensing fee as specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees); and~~]

[~~(III)~~ ~~submit documentation of completion of the required number of continuing education hours for each license period they have been granted an extension up to a maximum of 45 contact hours (4.5 CEUs).~~]

[~~(C) During a granted extension period, a pharmacist license shall be renewed and the pharmacist may practice pharmacy.~~]

(4) Exemptions from reporting requirements.

(A) All pharmacists licensed in Texas shall be exempt from the continuing education requirements during their initial license period.

(B) Pharmacists who have been licensed for 50 years are subject to the following.

(i) Pharmacists who are actively practicing pharmacy shall complete the continuing education requirements in order to renew their license.

(ii) Pharmacists who are not actively practicing pharmacy shall be granted an exemption to the reporting requirements for continuing education provided the pharmacists submit a completed renewal application for each license period which states that they are not practicing pharmacy. Upon submission of the completed renewal application, the pharmacist shall be issued a renewal certificate which states that pharmacist is inactive.

(iii) Pharmacists who wish to return to the practice of pharmacy after being exempted from the continuing education requirements as specified in clause (ii) of this subparagraph must:

(I) notify the board of their intent to actively practice pharmacy;

(II) pay the licensing fee as specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees); and

(III) provide copies of completion certificates from approved continuing education programs as specified in subsection (e) of this section for 30 hours. Approved continuing education earned within two years prior to the licensee applying for the return to active status may be applied toward the continuing education requirement for reactivation of the license but may not be counted toward subsequent renewal of the license.

(e) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804803
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.3

The Texas State Board of Pharmacy proposes amendments to §297.3, concerning Registration Requirements. The amendments, if adopted, clarify the requirements for registration as a pharmacy technician trainee and pharmacy technician and that the Board may require individuals to submit the required information to perform a criminal background check including fingerprinting.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that only qualified individuals are registered as pharmacy technicians or pharmacy technician trainees. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., October 30, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and §411.084 of the Texas Government Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §411.084 of the Government Code as authorizing the agency the to obtain criminal history information from the Federal Bureau of Investigations.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§297.3. Registration Requirements.

(a) General.

(1) - (2) (No change.)

(3) Individuals who apply and are qualified for both a pharmacy technician trainee registration and a pharmacy technician registration concurrently will not be considered for a pharmacy technician trainee registration.

(b) Registration for pharmacy technician trainees. An individual may register as a pharmacy technician trainee only once and the registration may not be renewed.

(1) Each applicant for registration [~~shall~~]:

(A) shall have a high school or equivalent diploma (e.g., GED), or be working to achieve a high school or equivalent diploma. For the purposes of this subparagraph, an applicant for registration may be working to achieve a high school or equivalent diploma for no more than two years;

(B) shall complete the Texas application for registration; and

(C) may be required to meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and paying the required fees.

(2) (No change.)

(3) Pharmacy technician trainee registrations expire two years from the date of registration or upon issuance of registration as a registered pharmacy technician, whichever is earlier.

(c) Initial registration for pharmacy technicians.

(1) - (2) (No change.)

(3) Once an applicant has successfully completed all requirements of registration, and the board has determined there are no grounds to refuse registration, the applicant will be notified of registration as a registered pharmacy technician and of his or her pharmacy technician registration number. If the pharmacy technician applicant was registered as a pharmacy technician trainee at the time the pharmacy technician registration issued, the pharmacy technician trainee registration expires.

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 305-8028

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PART 32. STATE BOARD OF EXAMINERS FOR SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY

CHAPTER 741. SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

The State Board of Examiners for Speech-Language Pathology and Audiology (board) proposes amendments to §§741.44, 741.64, 741.82, and 741.102 concerning the regulation and licensure of speech-language pathologists and audiologists.

BACKGROUND AND PURPOSE

The proposed rule amendments are intended to update the rules so that they reflect the board's current operational procedures in processing and approving licensure applications and to provide clarification of the rules, so that the intent is not ambiguous for license holders and the public. The proposed amendments are necessary to update and clarify existing licensure requirements for doctor of audiology students by reflecting current national standards.

SECTION-BY-SECTION SUMMARY

The amendment to §741.44(a) is proposed to clarify the experience requirements for supervisors.

The amendment to §741.64(g)(4) is proposed to delete obsolete language. The amendment to subsection (k)(17) is proposed to clarify documentation that is required.

The amendments to §741.82 are proposed to clarify the educational documentation required from the fourth-year audiology extern student.

The amendment to §741.102 is proposed to clarify what should be included on the written contract.

FISCAL NOTE

Joyce Parsons, Executive Director, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS ECONOMIC STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

Ms. Parsons has also determined that there will be no adverse economic impact to small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. The amendments do no impose additional fees. There is no anticipated negative impact on local employment. Therefore, an economic impact statement and regulatory flexibility analysis for micro-businesses and small businesses is not required.

PUBLIC BENEFIT

Ms. Parsons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to ensure the effective regulation of speech-language pathologists and audiologists in Texas, which will protect and promote public health, safety, and welfare.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Joyce Parsons, Executive Director, State Board of Examiners for Speech-Language Pathology and Audiology, MC-1982, P.O. Box 149347, Austin, Texas 78714-9347. Comments may also be sent through e-mail to speech@dshs.state.tx.us. Please write "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

SUBCHAPTER D. CODE OF ETHICS; DUTIES AND RESPONSIBILITIES OF LICENSE HOLDERS

22 TAC §741.44

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401.

§741.44. Requirements, Duties, and Responsibilities of Supervisors.

(a) A licensee must have three years of professional experience in providing direct client services in the area of licensure in order to supervise an intern or assistant. The licensee's practice when completing the [~~36-week full time~~] internship may be counted toward the three years of experience. If the licensed speech-language pathologist does not have the required experience, he or she may submit a written request outlining his or her qualifications and the reason for the request. The board's designee shall evaluate the request and approve or disapprove it within 15 working days of receipt by the board.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 5, 2008.

TRD-200804769

Kerry Ormson, Ed.D., Au.D.

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

Earliest possible date of adoption: October 19, 2008

For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER E. REQUIREMENTS FOR LICENSURE OF SPEECH-LANGUAGE PATHOLOGISTS

22 TAC §741.64

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401.

§741.64. Requirements for an Assistant in Speech-Language Pathology License.

(a) - (f) (No change.)

(g) A licensed speech-language pathologist shall assign duties and provide appropriate supervision to the assistant.

(1) - (3) (No change.)

(4) The supervising speech-language pathologist shall provide a minimum of two hours per week of supervision, at least one hour of which is face-to-face supervision[~~, at the location where the assistant is employed~~]. This applies whether the assistant's practice is full or part-time.

(5) - (7) (No change.)

(h) - (j) (No change.)

(k) The licensed speech-language pathology assistant shall not:

(1) - (16) (No change.)

(17) write or sign any formal document relating to the reimbursement for or the provision of speech-language pathology services [~~(e.g., treatment plans, diagnostic reports, reimbursement forms)~~].

(l) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson, Ed.D., Au.D.

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

Earliest possible date of adoption: October 19, 2008

For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. REQUIREMENTS FOR LICENSURE OF AUDIOLOGISTS

22 TAC §741.82

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401.

§741.82. Requirements for an Intern in Audiology License.

(a) - (c) (No change.)

[~~(d) An applicant who has successfully completed all academic and clinical requirements of §741.81(a) - (c) of this title but who has not had the degree officially conferred may be licensed as an intern in order to begin the supervised professional experience but shall submit an original or certified copy of a letter from the program director or designee verifying the applicant has met all academic course work, clinical experience requirements, and completed a thesis or passed a comprehensive examination, if required, and is awaiting the date of next graduation for the degree to be conferred. This letter is in addition to the original or certified copy of the transcripts required in subsection (c) of this section.~~]

(d) [~~(e)~~] An applicant who has successfully completed all academic [~~and clinical~~] requirements [~~of §741.81(a) - (c) of this title~~] but who has not had the degree officially conferred may be licensed as an intern in order to begin the supervised internship [~~professional experience~~]. The applicant shall submit the board prescribed form signed by [~~an original or certified copy of a letter from~~] the university program director or designee verifying the applicant is enrolled in a professionally recognized accredited doctoral [~~doctor of audiology (Au.D.)~~] program as approved by the board [~~and has met all academic course work, clinical experience requirements, and completed a thesis or passed a comprehensive examination, if required, but has not had the degree officially conferred~~]. This board prescribed form [~~letter~~] is in addition to [~~the original or certified copy of~~] the transcripts required in subsection (c) of this section.

[~~(f) An applicant whose graduate degree is received at a college or university accredited by the American Speech-Language-Hearing Association Council on Academic Accreditation will receive automatic approval of the course work and clinical experience if the program director or designee verifies that all requirements as outlined in §741.81(a) - (c) of this title have been met and review of the transcript shows that the applicant has successfully completed at least 24 semester credit hours acceptable toward a graduate degree in the area of audiology with six hours in speech-language pathology.~~]

(e) [~~(g)~~] An intern plan and agreement of supervision form shall be completed and signed by both the applicant and the licensed audiologist who agrees to assume responsibility for all services provided by the intern. The supervisor shall hold a valid Texas license in audiology and possess a master's degree or higher with a major in one of the areas of communicative sciences and disorders. The supervisor shall have practiced for at least three years and shall submit a signed statement verifying he or she has met this requirement. If the supervisor does not have the required experience he or she shall submit a written request outlining his or her qualifications and justification for the request for an exception. The board's [~~Board's~~] designee shall evaluate the request and approve or disapprove it within 15 working days of receipt by the board [~~Board~~].

(1) Written approval [~~Approval~~] from the board office shall be required prior to practice by the intern. The intern plan and agreement of supervision shall be submitted upon:

(A) application for a license;

(B) license renewal;

(C) changes in supervision; and/or

(D) addition of other supervisors.

(2) In the event more than one licensed audiologist agrees to supervise the intern, the primary supervisor shall be identified and separate forms submitted by each supervisor.

(3) In the event the supervisor ceases supervision of the intern, the intern shall stop practicing immediately until a new supervisor is approved by the board office.

(4) Should the intern practice without approval from the board office, disciplinary action shall be initiated against the intern. If the supervisor had knowledge of this violation, disciplinary action against the supervisor shall also be initiated.

(f) [~~(h)~~] The internship shall:

[~~(1) begin within four years after the academic and clinical experience requirements as required by subsection (a) of this section have been met;~~]

[~~(2) be completed within a maximum period of 36 months once initiated;~~]

[~~(3) be successfully completed in no more than two attempts;~~]

(1) [~~(4)~~] consist of 1,600 hours of supervised [~~36 weeks of full-time, or its part-time equivalent, of supervised professional experience in which bona fide~~] clinical work as defined in paragraph (2) of this subsection. The internship shall begin after completion of all academic coursework; and [~~has been accomplished in audiology. Full-time employment is defined as a minimum of 35 hours per week in direct client clinical work. Part-time equivalent is defined as follows:~~]

[~~(A) 0 - 14 hours per week--no credit will be given;~~]

[~~(B) 15 - 21 hours per week for over 72 weeks;~~]

[~~(C) 22 - 28 hours per week for over 60 weeks; or~~]

[~~(D) 29 - 34 hours per week for over 48 weeks;~~]

(2) [~~(5)~~] involve primarily clinical activities such as assessment, diagnosis, evaluation, screening, treatment, report writing, family/client consultation, and/or counseling related to the management process of individuals. [~~who exhibit communication disabilities;~~]

[~~(6) be divided into three segments with no fewer than 36 clock hours of supervisory activities to include:~~]

[~~(A) six hours of face-to-face observations per segment by the board approved supervisor(s) of the intern's direct client contact at the worksite in which the intern provides screening, evaluation, assessment, habilitation, and rehabilitation; and~~]

[~~(B) six hours of other monitoring activities per segment with the board approved supervisor(s) which may include correspondence, review of videotapes, evaluation of written reports, phone conferences with the intern, evaluations by professional colleagues; or~~]

[~~(C) an alternative plan as approved by the board's designee.~~]

[~~(i) An applicant who does not meet the time frames defined in subsection (h)(1) - (2) of this section shall request an extension, in writing, explaining the reason for the request. Evaluation of the intern's progress or performance from all supervisors must accompany the request. Intern plans and supervisory evaluations for completed segments must be submitted. The board's designee shall determine if the internship:~~]

[~~(1) should be revised or extended; and~~]

[~~(2) whether additional course work, continuing professional education hours or passing the examination referenced in §741.121 of this title (relating to Examination Administration) is required.~~]

[~~(j) During each segment of the internship, the primary supervisor shall conduct a formal evaluation of the intern's progress in the development of professional skills. Documentation of this evaluation shall be maintained by both parties for three years or until the audiology license is granted. A copy of this documentation must be submitted to the board upon request.~~]

(g) [~~(k)~~] Prior to implementing changes in the internship, written approval from the board office is required.

(1) If the intern changes his or her supervisor or adds additional supervisors, a current intern plan and agreement of supervision form shall be submitted by the new supervisor and approved by the board before the intern may resume practice. A report of completed internship form shall be completed by the previous supervisor and the intern and submitted to the board office upon completion of that portion of the internship. It is the decision of the supervisor to determine whether the internship meets the board's requirements [~~is acceptable~~]. The board office shall evaluate the form and inform the intern of the results.

(2) A primary supervisor who ceases supervising an intern shall submit a report of completed internship form for the portion of the internship completed under his or her supervision. This must be submitted within 30 days of the date the supervision ended.

(3) A secondary supervisor who ceases supervising an intern shall submit written documentation of the intern's performance under their supervision. This must be submitted within 30 days of the date the supervision ended.

(4) If the intern changes his or her employer but the supervisor and the number of hours employed per week remain the same, the supervisor shall submit a signed statement giving the name, address and phone number of the new location. This must be submitted within 30 days of the date the change occurred.

[~~(5) If the number of hours worked per week changes but the supervisor and the location remain the same, the supervisor shall submit a signed statement giving the date the change occurred and the number of hours per week the intern is now working. A report of completed internship form shall be submitted for the past experience, clearly indicating the number of hours worked per week. This must be submitted within 30 days of the date the change occurred.~~]

(5) [~~(6)~~] In any professional context the licensee must indicate the licensee's status as an audiology intern.

[~~(l) If the intern wishes to continue to practice, within 30 days of completion of the 36 weeks of full-time, or its part-time equivalent, supervised professional experience as defined in subsection (h) of this section, the intern shall apply for either:~~]

[~~(1) an audiology license under §741.81 of this title if the intern passed the examination referenced in §741.121 of this title; or~~]

[~~(2) a temporary certificate of registration under §741.85 of this title (relating to Requirements for a Temporary Certificate of Registration in Audiology) if the intern has not passed the examination referenced in §741.121 of this title.~~]

(h) [~~(m)~~] The intern may continue to practice under supervision if he or she holds a valid intern license while awaiting the processing of the audiology license. [~~or the temporary certificate of registration in audiology as follows:~~]

[~~(1)~~] The current supervisor(s) shall agree to supervise the intern. [~~from the "Ending Date of Internship" as shown on the report of completed internship form until the intern receives either the audiology license or the temporary certificate of registration.~~]

[~~(2)~~] If the intern changes supervisors, the new supervisor shall first submit the intern plan and agreement of supervision form and receive board approval before the intern may resume practice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson, Ed.D., Au.D.
Presiding Officer
State Board of Examiners for Speech-Language Pathology and Audiology
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER H. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §741.102

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401.

§741.102. General Practice Requirements of Audiologists and Interns in Audiology who Fit and Dispense Hearing Instruments.

In accordance with the Act, a licensed audiologist or licensed intern in audiology registered to fit and dispense hearing instruments shall:

(1) - (3) (No change.)

(4) inform the consumer of a hearing instrument by written contract of a trial period of 30 consecutive days. The contract shall include a specific date by which the client must return the instrument to qualify for a refund. If the date falls on a holiday, weekend, or a day the business is not open, the effective date shall be the first day the business reopens.

(A) All charges and fees associated with such trial period shall be stated in this contract [~~agreement~~] which shall also include the name, address, and telephone number of the State Board of Examiners for Speech-Language Pathology and Audiology. The contract shall include the full printed name, signature, and license number of the audiologist dispensing the hearing instrument. The purchaser shall receive a copy of this contract [~~agreement~~].

(B) (No change.)

(5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson, Ed.D., Au.D.
Presiding Officer
State Board of Examiners for Speech-Language Pathology and Audiology
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For further information, please call: (512) 458-7111 x6972

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER L. CLAIMS PROCESSING--DUPLICATE WARRANTS

34 TAC §5.140

The Comptroller of Public Accounts proposes an amendment to §5.140, concerning replacement warrants. This section is being amended to reflect a change in the comptroller's Web cancellation system and the requirements for submitting a payment cancellation voucher. This change is found in subsection (e)(1). This section is also being amended to reflect a change in the delegation of the printing of Texas Assistance for Needy Families (TANF) warrants from the Texas Department of Human Services to the Texas Health and Human Services Commission (HHSC). The change was officially executed in a memorandum of understanding between the Comptroller and HHSC in September 2004. This change is found in subsection (e)(2).

The amended section also excludes federal guaranteed student loan warrants from the 2-year expiration date as these warrants are federally mandated to expire within 120 days from the date of issuance. This is found in subsection (g)(2). Other changes to the section are for clarity.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the amended rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the amended rule is in effect, the amendment would benefit the public by improving the accuracy and efficiency of the state accounting system. The proposed amendment would have no significant fiscal impart on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Joani Bishop, Manager, Statewide Fiscal Services, P.O. Box 13528, Austin, Texas 78711.

The amendment is proposed under Government Code, §403.054, which requires the comptroller to adopt rules relating to the issuance of replacement warrants.

The amendment implements Government Code, §403.054.

§5.140. Replacement Warrants.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Comptroller--The Comptroller of Public Accounts [~~comptroller of public accounts~~] of the State of Texas.

(2) Include--A term of enlargement and not of limitation or exclusive enumeration. The use of the term does not create a presumption that components not expressed are excluded.

(3) May not--A prohibition. The term does not mean "might not" or its equivalents.

(4) Payee--A person to whom a warrant is made payable.

(5) Payment cancellation voucher--The paper form prescribed by the comptroller that a state agency completes when requesting cancellation of a warrant by the comptroller.

(6) Person--Includes an individual, a corporation, an organization, a government or governmental subdivision or agency, a business trust, an estate, a trust, a partnership, an association, and any other legal entity.

(7) Replacement warrant--A warrant issued to replace an original warrant.

(8) Statewide [~~Uniform statewide~~] accounting systems [~~system~~]--Includes the Uniform Statewide Accounting System, the Uniform Statewide Payroll/Personnel System and the Statewide Payroll/Personnel Reporting System [~~uniform statewide payroll/personnel system~~].

(b) Request for issuance. A person may request issuance of a replacement warrant if the person is the payee of the original warrant. The request must be directed to the state agency on whose behalf the original warrant was issued and must be accompanied by any statements or documentation required by the agency. Upon receipt of the request, the agency must determine whether:

(1) the original warrant was lost, destroyed, or stolen;

(2) the person did not receive the original warrant; or

(3) the person's endorsement on the original warrant was forged.

(c) Issuance by comptroller. The comptroller may issue a replacement warrant only if:

(1) the comptroller receives proper notification of the existence of at least one of the conditions listed in subsection (b) of this section, concerning the original warrant;

(2) the state agency on whose behalf the original warrant was issued provides the notification; and

(3) subsection (f) of this section, does not prohibit issuance of the replacement warrant.

(d) Issuance by other agency. A state agency other than the comptroller may issue a replacement warrant if:

(1) the comptroller has delegated to the agency under [~~the~~] Government Code, §403.060 the authority to issue original and replacement warrants;

(2) the replacement warrant would replace an original warrant previously issued by the agency;

(3) at least one of the conditions listed in subsection (b) of this section, exists concerning the original warrant; and

(4) subsection (f) of this section, does not prohibit issuance of the replacement warrant.

(e) Notification [~~Notice~~].

(1) This paragraph applies to all warrants except the financial assistance warrants governed by [~~the~~] Human Resources Code, §31.038. Notification to the comptroller under subsection (c)(1) of this section, is proper only if the agency:

(A) submits the information directly to the comptroller's Web cancellation system in accordance with the comptroller's requirements, if the agency's documentation is retained in the agency's files for audit by the comptroller; or [~~properly completes a payment cancellation voucher;~~]

(B) complies with the comptroller's requirement to [~~either~~] submit a payment cancellation [~~the~~] voucher to the comptroller for cancellation of warrants that are not eligible to be canceled on the comptroller's Web cancellation system. [~~or retain the voucher in the agency's files for audit by the comptroller; and~~]

(i) The agency must complete and submit the payment cancellation voucher to the comptroller.

(ii) The agency may substitute the comptroller's payment cancellation voucher with an agency payment cancellation voucher only upon approval by the comptroller.

[~~(C) submits the information on the voucher directly to the uniform statewide accounting system in accordance with the comptroller's requirements, if the voucher is retained in the agency's files.~~]

(2) This paragraph applies only to the financial assistance warrants governed by [~~the~~] Human Resources Code, §31.038. Notification to the comptroller under subsection (c)(1) of this section, is proper only if the Texas Department of Health and Human Services [~~properly~~] completes and submits the appropriate documentation [~~a payment cancellation voucher~~] to the comptroller.

(3) After a warrant is canceled, the state agency that requested its cancellation may request issuance of a replacement warrant in accordance with the procedures adopted by the comptroller. The request for a replacement warrant must be submitted to the statewide accounting system from which the original warrant was issued.

(f) Prohibition on issuance. A replacement warrant may not be issued if:

(1) the original warrant has been paid, unless a refund of the payment has been obtained by the state;

(2) the period during which [~~the state treasurer or~~] the comptroller may pay the original warrant has expired under [~~the~~] Government Code, §404.046, or other applicable law;

(3) the payee of the replacement warrant is not the same as the payee of the original warrant; or

(4) state or federal law prohibits the issuance of a warrant to the payee of the replacement warrant.

(g) Limitations and exceptions.

(1) A replacement warrant must reflect the same fiscal year as the original warrant and may not be paid unless presented to the comptroller or a financial institution before the expiration of two years after the close of the fiscal year in which the original warrant was issued.

(2) Except as provided by paragraph (1) of this subsection, a replacement warrant for a federal guaranteed student loan identified by the Texas Higher Education Coordinating Board must be issued

within 120 calendar days from its original date of issuance and may not be paid unless presented to the comptroller or a financial institution before its expiration date.

(3) [~~(2)~~] Except as provided by this paragraph, the Texas Workforce Commission shall comply with this section when issuing a replacement warrant. The deadline for issuance of the warrant is the deadline specified in [~~the~~] Labor Code, Chapter 210, Subchapter B.

(4) [~~(3)~~] This section applies to the cancellation of a warrant or check or the issuance of a replacement warrant or check by a state agency other than the comptroller only if the agency issued the original warrant or check under authority delegated to the agency by the comptroller under [~~the~~] Government Code, §403.060.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 5, 2008.

TRD-200804776
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER A. DEFINITIONS

37 TAC §35.1

The Texas Department of Public Safety proposes amendments to §35.1, concerning Definitions. Amendments to §35.1 are necessary in order to add new definitions to define and clarify that the term "application" includes renewal applications for purposes of statutory eligibility and for denial actions under §1702.364 or §1702.3615; and to define the phrase "due diligence" as employed in 37 TAC §35.204, in order to provide guidance to the Board's investigators, staff, and the security industry regarding employers' specific obligations in performing background checks.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There are no anticipated economic costs to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater clarity and efficiency in the Bureau's enforcement of Chapter 1702.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service- Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC 0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.1. Definitions.

The following words or terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) - (14) (No change.)

(15) Application--For purposes under Chapter 1702, "application" includes an application for the renewal of any registration, commission, or license issued under the Act.

(16) Due Diligence--For purposes of §35.204 of this title (relating to Pre-Employment Check), the exercise of due diligence may be satisfied through the review of the applicant's non-confidential criminal history on the Department of Public Safety's public website or other commercial website, or by obtaining a criminal history clearance letter from the District Clerk and County Clerk Offices in the applicant's county of residence. This does not prevent an employer from using a more stringent method of determining an applicant's eligibility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804847
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 424-2135

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SUBCHAPTER B. PROHIBITIONS

37 TAC §35.14

The Texas Department of Public Safety proposes new §35.14, concerning Unlicensed General Contractors or Other Intermediaries. New §35.14 is necessary in order to clarify existing policy and to provide guidance to the public and the industry regarding the regulation of service providers in the context of complex projects involving multiple parties.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater clarity in the Bureau's interpretation and enforcement of Chapter 1702.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service - Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.14. Unlicensed General Contractors or Other Intermediaries.

An unlicensed general contractor or other intermediary may not offer to provide and may not provide a regulated service. Any contract to which an unlicensed general contractor is a party which also involves regulated services must include a licensed subcontractor and must meet the following requirements:

(1) the offer, bid, or proposal, and any related advertisements, must clearly and conspicuously state that the general contractor or broker is not licensed to perform the service in question, and that the regulated service is to be provided exclusively by a licensed party;

(2) the contract and any bid or offer to perform a regulated service must identify the licensee by name and licensee number;

(3) the licensed subcontractor must be an expressed party to the contract; and

(4) the contract must clearly and conspicuously provide that the licensee is fully responsible for the regulated service and that the unlicensed general contractor will have no involvement in the regulated service.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

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Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 424-2135

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SUBCHAPTER C. STANDARDS

37 TAC §35.34

The Texas Department of Public Safety proposes amendments to §35.34, concerning Standards of Conduct. Amendments to §35.34 amend subsection (j) and are necessary in order to clarify the obligations of employers who are made aware of arrests or offenses of their regulated employees.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There are no anticipated economic costs to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater clarity in the Bureau's interpretation and enforcement of the Private Security Board's administrative rules and of Chapter 1702.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to

protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service- Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC 0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.34. Standards of Conduct.

(a) - (i) (No change.)

(j) All licensees, registrants, commissioned officers, or managers, if arrested, charged, or indicted for a criminal offense above the level of Class C misdemeanor shall within 72 hours notify their employer, and the employer (when notified by the employee or upon other confirmation that an offense has occurred) [~~who~~] shall then notify the board by fax at (512) 424-7729 or in writing at the Austin office of the board within 72 hours of notification [~~by licensee~~], including the name of the arresting agency, the offense, court, and cause number of the charge or indictment, if any.

(k) - (n) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200804848
Stanley E. Clark
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER E. GENERAL ADMINISTRATION AND EXAMINATIONS

37 TAC §35.60

The Texas Department of Public Safety proposes new §35.60 concerning Guard Company Manager Requirements. New §35.60 is necessary in order to establish the experience and eligibility requirements for guard company managers.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater quality of service and fewer violations or enforcement actions relating to guard companies.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service - Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.60. Guard Company Manager Requirements.

(a) All applicants for registration as manager of a guard company must be at least 21 years of age at the time of application.

(b) All such applicants must have at least three years accumulated employment experience in the field in which the applicant's prospective employer is licensed, and must have at least one year of experience in a managerial or supervisory position.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stanley E. Clark
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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37 TAC §35.61

The Texas Department of Public Safety proposes amendments to §35.61, concerning Written Examination. Amendments to the section are necessary in order to clarify the scope of the manager's examination and to provide for discretion on the part of the Private Security Bureau manager in establishing the examination's passing score.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There are no anticipated economic costs to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be higher quality of company management, in turn resulting in better service and fewer violations of enforcement actions.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service - Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC 0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b) which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.61. Written Examination.

(a) All applicants for registration as manager [~~or supervisor applicants shall~~] must pass a written examination administered by the Private Security Bureau [~~board~~].

(b) The passing grade of a written examination shall be determined by the Bureau Manager [~~75% of the total points possible~~].

(c) The written examination may [~~shall~~] cover any [~~all~~] sections of the Act and these rules determined by the Bureau Manager to be relevant to the management of a regulated entity.

(d) Before being administered the written examination, the [~~manager or supervisor~~] applicant must:

(1) present a valid identification card which contains a photograph upon request;

(2) report 30 minutes prior to the examination time; and

(3) comply with all the written and verbal instructions of the proctor.

(e) During an examination session, applicants [~~a manager or supervisor applicant~~] shall not:

(1) bring any books, or other written material related to the content of the examination into the examination room;

(2) refer to, use, or possess any such written material in the examination room;

(3) give or receive answers or communicate in any manner with another examinee during the examination;

(4) communicate any of the content of an examination to another at any time;

(5) steal, copy, or in any way reproduce any part of the examination;

(6) engage in any deceptive or fraudulent act either during an examination or to gain admission to it;

(7) solicit, encourage, direct, assist, or aid another person to violate any provision of this section; or

(8) disrupt the examination session.

(f) The time limit for examination will be determined at the discretion of the Bureau Manager [~~manager~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804840
Stanley E. Clark
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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37 TAC §35.78

The Texas Department of Public Safety proposes new §35.78, concerning Evidence of Insurance. New §35.78 is necessary in order to clarify the statutory requirements for proof of insurance for licensees and to facilitate enforcement of those requirements.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses re-

quired to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater efficiency in the processing of applications and in the enforcement of the statute's insurance requirements, requirements which are intended to protect the public from damage and injuries caused by licensees.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service- Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.78. Evidence of Insurance.

(a) For purposes of the requirements of §1702.124 of the Occupations Code, the certificate or other documentary evidence of insurance submitted to the Bureau must specifically show:

(1) that the insurance is applicable to the conduct for which the licensee is licensed;

(2) the exclusions or endorsements specific to the activity for which the licensee is licensed, or, that there are no such exclusions or endorsements; and

(3) the minimum coverage limits, specifically distinguishing the limits for:

(A) each occurrence of bodily injury and property damage;

(B) each occurrence of personal injury; and

(C) the total aggregate amount of coverage for all Occurrences.

(b) The applicant must also provide the Bureau with the insurance agent's contact information and Texas license number.

(c) Form PSB-05 (Certificate of Liability Insurance) is available for this purpose, but its use is not mandatory.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804849
Stanley E. Clark
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.97

The Texas Department of Public Safety proposes new §35.97, concerning Entry of Appearance Required. New §35.97 is necessary in order provide for more efficient handling of contested cases and allow for the administrative disposition of cases in which the respondent fails to make an appearance.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater efficiency in the handling of contested cases.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service- Private Security Bureau, Texas Department of Public Safety, P.O.

Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.97. Entry of Appearance Required.

(a) The respondent shall enter an appearance within 20 days of the date on which the notice of hearing is provided.

(b) For purposes of this section, an entry of appearance means the filing of a written answer or other responsive pleading with the State Office of Administrative Hearings (SOAH).

(c) For purposes of this section, notice of hearing is provided to a respondent on the date of deposit in the United States mail of a registered or certified letter, return receipt requested, containing the notice of hearing, or if provided by personal service, the date of personal delivery of the notice of hearing.

(d) The failure by the respondent to timely enter an appearance as provided in this section shall entitle the petitioner to motion the administrative court to abate the proceeding and to informally dispose of the case by default.

(e) The notice of hearing shall include the following language in capital letters in at least 12 point boldface type: "YOU MUST ENTER AN APPEARANCE BY FILING A WRITTEN ANSWER OR RESPONSE TO THE ALLEGATIONS CONTAINED IN THIS NOTICE WITHIN 20 DAYS OF THE DATE THIS NOTICE WAS MAILED OR PERSONALLY DELIVERED TO YOU. YOUR FAILURE TO DO SO SHALL ENTITLE THE DEPARTMENT TO REQUEST THE ABATEMENT OF THE CASE AND TO INFORMALLY DISPOSE OF THIS CASE BY DEFAULT. THE ALLEGATIONS AGAINST YOU WILL BE DEEMED ADMITTED AND AN ORDER ENFORCING THE ACTION WILL BE ENTERED BY THE MANAGER OF THE BUREAU."

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804846
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 424-2135

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SUBCHAPTER N. RECIPROCITY

37 TAC §35.221

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §35.221, concerning General Reciprocity. Repeal of the section is necessary in order to eliminate a source of confusion on the part of the public and the regulated community, and conflict with the Private Security Act (Chapter 1702, Occupations Code).

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal. There are no anticipated economic costs to persons who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be greater clarity in the interpretation and enforcement of the statute.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service - Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.221. General Reciprocity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804842

Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 424-2135

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37 TAC §35.222

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §35.222, concerning Limited Reciprocity. Repeal of the section is necessary in order to eliminate a source of confusion on the part of the public and the regulated community, and conflict with the Private Security Act (Chapter 1702, Occupations Code).

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal. There are no anticipated economic costs to persons who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be greater clarity in the interpretation and enforcement of the statute.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service - Private Security Bureau, Texas Department of Public Safety, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.222. Limited Reciprocity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stanley E. Clark
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER Q. TRAINING

37 TAC §35.257

The Texas Department of Public Safety proposes amendments to §35.257, concerning Training Courses. Amendments to §35.257 are necessary in order to allow applicants who are recently retired full-time peace officers to be exempted from training under the same conditions currently provided to active peace officers, on the grounds that such individuals have received training identical to that of active full-time peace officers.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There are no anticipated economic costs to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater efficiency in the processing of applications for commissions and a potentially higher quality pool of applicants.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal are requested and may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service - Private Security Bureau, Texas Department of Public Safety, P.O.

Box 4143, MSC 0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061 are affected by this proposal.

§35.257. Training Courses.

(a) Security and Personal Protection Officer Training Courses.

(1) In accordance with the Act, the following training shall be required of all security and personal protection officers, as indicated:

(A) (No change.)

(B) Level III Training - shall be completed by applicants for a security officer commission and a personal protection officer authorization. A certificate indicating completion of Level III Training shall be submitted to the board along with the application to register the individual. Applicants for either a security officer commission or a personal protection officer authorization who are full-time peace officers, certified by the Texas Commission on Law Enforcement Officer Standards and Education, may be exempted from the Level III training requirements upon submission to the Bureau of a sworn affidavit attesting to the applicant's review of, and familiarity with, Chapter 1702 of the Occupations Code and the related administrative rules. Applicants for either a security officer commission or a personal protection officer authorization who have honorably retired as Texas peace officers within the preceding two years may be exempted from the Level III training requirements upon submission to the Bureau of proof of their honorably retired status (in the form of documentation from the employing agency or the Texas Commission on Law Enforcement Officer Standards and Education), and of a sworn affidavit attesting to the applicant's review of, and familiarity with, Chapter 1702 of the Occupations Code and the related administrative rules. For purposes of the above exemption, "honorably retired" means that the applicant:

(i) Did not retire in lieu of any disciplinary action;

(ii) Was eligible to retire from the law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the applicant's employment with the agency; and

(iii) Is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only because the law enforcement agency that employed the applicant does not offer a pension or annuity to its employees.

(2) - (5) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stanley E. Clark
Director
Texas Department of Public Safety
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §97.3, concerning license fees; §97.17, concerning application procedures for a renewal license; §97.25, concerning application procedures and requirements for change of ownership; and §97.31, concerning time frames for processing and issuing a license, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies (HCSSAs).

BACKGROUND AND PURPOSE

The purpose of the amendments is to implement portions of Senate Bill (SB) 1318, 80th Legislature, Regular Session, 2007, which, in part, amended Texas Health and Safety Code, §142.0105. Amended Texas Health and Safety Code, §142.0105, specifies a timeframe of not later than the 45th day before the expiration date of the license for submitting a license renewal application; allows DADS to set a late fee if a license renewal application is submitted later than the 45th day before the expiration date of the license; increases the number of days before the date a license expires for DADS to send notice to a HCSSA of the impending expiration of a license; and adds that the written notice of license expiration includes a license renewal application and instructions.

The proposed amendment specifies that the deadline for submitting a renewal application is: (1) no later than the 45th day before the expiration date of the license or a late fee may be charged; and (2) no later than the last day on the license or the HCSSA is not eligible to renew the license. The amendment also sets the amount of the late fee for a late renewal application.

In addition, the amendment specifies that DADS sends notice of license expiration, including a renewal application and instructions, not later than the 120th day before the date of license expiration. The amendment also increases the number of days before a license expires for an agency to notify DADS and submit a written request for a renewal application if the agency does not receive DADS' written notice.

Finally, the amendment also addresses a provision in Texas Health and Safety Code, §142.009(h), that requires an accredited HCSSA to submit to DADS documentation of accreditation from the accrediting body when renewing a license, and specifies what a HCSSA must do if it submits a renewal application after the date the license expires.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §97.3 specifies the late fees for a late renewal application.

The proposed amendment to §97.17 requires an accredited agency to submit to DADS documentation of current accreditation with each renewal application. The amendment also updates the application procedures for a renewal license, including: (1) when and what DADS sends to notify a HCSSA of impending license expiration; (2) the timeframe for a HCSSA to submit a renewal application; (3) when a late fee may be assessed; (4) receipt of written notice from DADS that a late fee is assessed; and (5) what happens if an agency submits a renewal application after the expiration date of the license. The amendment also clarifies that a HCSSA must continue to submit a renewal application until an action by DADS to revoke, suspend or deny renewal of the license is completed. The proposal also updates and corrects rule terminology.

The proposed amendment to §97.25 updates the rule cross-references to the late fee for a late application for an initial license resulting from a change of ownership and makes necessary technical corrections to cross-references.

The proposed amendment to §97.31 includes technical corrections to cross-references. The amendment also changes the current 30 day time frame to 45 days before a license expires as the period during which DADS may suspend issuing a renewal license if an agency is subject to a proposed or pending enforcement action on its license. This change is being made to make the time period the same as the time period for submitting a timely renewal application.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the amendments are in effect, there are fiscal implications for state government as a result of enforcing or administering the section. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years that the amendments are in effect is an estimated increase in revenue of $25,594 in fiscal year (FY) 2009; $35,875 in FY 2010; $37,625 in FY 2011; $39,375 in FY 2012; and $41,125 in FY 2013.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments may have an adverse economic effect on small and micro-businesses because the amendments change the requirements for a HCSSA to submit a timely renewal application. If a HCSSA does not comply with the requirements, DADS assesses a late fee against the HCSSA, as provided in current rule.

DADS estimates that the number of small and micro-businesses subject to the proposed amendments is less than 3,472. This estimate is based on DADS records, which indicate that of the 3,742 licensed HCSSAs, approximately 3,472 of them are formed for the purpose of making a profit, one of the requirements for being a small or micro-business. DADS does not have information regarding number of employees or gross receipts to determine what percentage of these HCSSAs are operated by an entity that would meet the definition of a "small business" or "micro-business."

The potential economic impact for a small or micro-business is a late fee of $437.50 or $875 for each renewal application that is not timely filed, depending on whether the renewal is for one year or two. However, that fee is incurred only if the business submits an application for a renewal license after the deadline established in the proposed amendments. Therefore, DADS projects that there will be minimal economic impact to small and micro-businesses subject to these amendments.

Several regulatory options were considered in determining how to accomplish the objectives of the proposed rules, while minimizing the adverse economic effect on small and micro-businesses. The Texas Health and Safety Code, Chapter 142, §142.0105(b) states that an applicant who submits a renewal application later than the 45th day before the expiration date is subject to a late fee in accordance with agency rules. These amendments propose a late fee that is one-half the amount of the renewal application fee, which is $437.50 or $875, depending on the license period. DADS considered assessing a lower late fee, but the proposal does not increase the current fee and DADS determined that assessing a lower late fee would not be effective in encouraging compliance with licensure rules. DADS also considered not assessing a late fee for submitting a late renewal application. DADS determined, however, that assessing a late fee is necessary to encourage compliance with licensure rules. Finally, DADS considered assessing late fees based on the size of a HCSSA, but determined that implementation of such a system would have additional administrative costs associated with it that outweigh the benefits of such a system, especially since a small business can avoid the penalty all together by complying with the deadlines in the licensing standards for submitting an application for a renewal license.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS' rules will be in compliance with state law and that DADS will have a standard 45-day timeframe to submit a renewal application across the programs DADS regulates.

Ms. Durden anticipates that there will be an economic cost to persons who are required to comply with the amendments. The probable economic cost to persons required to comply with the amendments for each year of the first five years the amendments are in effect will be a late fee for noncompliance with requirements for submitting a timely renewal application. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-002, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st Street, Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments

falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 002" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.3

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, Chapter 142.

§97.3. License Fees.

(a) - (b) (No change.)

(c) The late fee established in §97.17 of this chapter (relating to Application Procedures for a Renewal License) is one-half the amount of the required renewal license fee established in subsection (a) or (b) of this section as appropriate plus the required renewal fee.

(d) [~~(c)~~] If an applicant for an initial license based on a change of ownership makes late application for a license to DADS in accordance with §97.25 of this chapter (relating to Application Procedures and Requirements for Change of Ownership), the applicant must submit the appropriate initial license fee as set out in subsection (a) of this section plus a late fee of $250.

(e) [~~(d)~~] DADS does not consider an application as officially submitted until the applicant pays the license fee. The fee must accompany the application packet.

(f) [~~(e)~~] A fee paid to DADS is not refundable, except as provided by §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(g) [~~(f)~~] DADS accepts a certified check, money order, company check or personal check made out to the Department of Aging and Disability Services in payment for a required fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804865

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §§97.17, 97.25, 97.31

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, Chapter 142.

§97.17. Application Procedures for a Renewal License.

(a) - (e) (No change.)

(f) With each renewal application, an accredited agency must submit documentation of its current accreditation by an accreditation organization approved by DADS.

(g) [~~(f)~~] DADS sends written notice of expiration of a license to an agency at least 120 [~~60~~] days before the expiration date of the license. The written notice includes an application to renew the license and instructions for completing the application.

(1) If an agency does [~~has~~] not received notice of expiration from DADS at least 90 [~~45~~] days before the expiration date of a license, the agency must notify DADS and submit a written request for a renewal application [~~for a license~~].

(2) An agency must submit [~~to DADS~~] a complete and correct renewal application to DADS that is postmarked no later than the 45th [~~at least 30~~] days before the expiration date of the [~~a~~] license.

(3) If an agency submits a renewal application that is postmarked later than the 45th day before the expiration date of a license, but no later than the expiration date of the license, DADS assesses the late fee set out in §97.3(c) of this chapter for failure to comply with paragraph (2) of this subsection.

(4) [~~(3)~~] All documents submitted with the renewal application must be notarized copies or originals.

(h) [~~(g)~~] Upon receipt of a renewal application and the renewal license fee, DADS reviews the application [~~material~~] to determine whether it is complete and correct. A complete and correct renewal application includes all documents and information that DADS re-

quests as part of the application process. If DADS receives a partial fee, the renewal application and monies are returned.

(1) DADS processes the renewal application according to the time frames in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an agency decides not to continue the application process for a renewal license after submitting the renewal application and the renewal license fee, the agency must submit to DADS a written request to withdraw the renewal application. DADS does not refund the renewal license fee.

(3) If an agency receives written [~~a~~] notice from DADS that some or all of the information required by this section is missing or incomplete, the [~~agency must submit the~~] required information must be submitted to DADS and postmarked no later than 30 days after the date of the notice. If an agency fails to submit the required information to DADS postmarked no later than [~~within~~] 30 days after the date of the notice [~~date~~], DADS considers the renewal application incomplete and denies the application. If DADS denies the renewal application, DADS does not refund the renewal license fee.

(4) If an agency receives a written notice from DADS that a late fee is assessed in accordance with subsection (g) of this section, the agency's late fee must be postmarked no later than 30 days after the date of the notice or DADS considers the renewal application incomplete and denies the application. If DADS denies the renewal application, DADS does not refund the renewal license fee.

(i) If an agency submits a renewal application to DADS that is postmarked after the expiration date of the license, DADS denies the renewal application and does not refund the renewal license fee. The agency is not eligible to renew the license and must cease operation on the date the license expires. An agency whose license expires must apply for an initial license in accordance with §97.13 of this subchapter (relating to Application Procedures for an Initial License).

(j) [~~(h)~~] [~~If an agency fails to make a timely and sufficient renewal application at least 30 days before the expiration date of the license, the agency must cease operation on the date the license expires.~~] If an agency submits [~~makes~~] a timely renewal application [~~of a license~~] in accordance with this section, and an action to revoke, suspend, or deny renewal of the license is pending, the agency may continue to operate, and the license is valid until the agency has had an opportunity for a formal hearing as described in §97.601 of this chapter (relating to Enforcement Actions). Until the action to revoke, suspend, or deny renewal of the license is completed, the agency must continue to submit a renewal application in accordance with this section. DADS issues a renewal license only if DADS determines the reason for the proposed action no longer exists.

(k) [~~(i)~~] If a license holder fails to submit a timely renewal application in accordance with this section [~~renew a license~~] because the license holder is or was on active duty with the armed forces of the United States of America outside the state of Texas, the license holder may renew the license pursuant to this subsection.

(1) An individual having power of attorney from the license holder or other authority to act on behalf of the license holder may request renewal of the license. The renewal application must include a current address and telephone number for the individual requesting the renewal.

(2) An agency may request a renewal application before or after the expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the license holder is or was on active military duty serving outside the state of Texas must be filed with DADS along with the renewal application.

(4) A copy of the power of attorney from the license holder or other authority to act on behalf of the license holder must be filed with DADS along with the renewal application [~~form~~].

(5) A license holder renewing under this subsection must pay the applicable renewal fee.

(6) A license holder is not authorized to operate the agency for which the license was obtained after the expiration of the license unless and until the license holder actually renews the license.

(7) This subsection applies to a license holder who is an individual or a partnership comprised of individuals, all of whom are or were on active duty with the armed forces of the United States of America serving outside the state of Texas.

§97.25. Application Procedures and Requirements for Change of Ownership.

(a) An application for an initial license resulting from a change of ownership must be requested at least 60 days before the effective date of the change of ownership.

(1) - (2) (No change.)

(3) An applicant must meet the criteria for a license as described in §97.11 of this subchapter [~~the chapter~~] (relating to Criteria and Eligibility for Licensing).

(4) If an applicant submits a timely and sufficient application packet and license fee and meets all criteria for a license, DADS issues the applicant a license effective on the date of the transfer of ownership. DADS considers an applicant to have filed a timely and sufficient application for a license if the applicant submits:

(A) - (B) (No change.)

(C) a complete and correct application packet and license fee to DADS that is postmarked less than 30 days before the anticipated date of sale or other transfer of ownership, and before the expiration date of the license; and the applicant pays the [~~a~~] late fee set out in §97.3(d) [~~as required by §97.3(c)~~] of this chapter (relating to License Fees); or

(D) (No change.)

(5) If an applicant files a timely application packet and license fee, but DADS determines that the application packet is incomplete and a letter explaining the circumstances that prevented its completion was not filed with the application, DADS considers the application timely filed but incomplete.

(A) DADS provides the applicant with written notification of the missing information required to complete the application and may assess the [~~a~~] late fee [~~as~~] set out in §97.3(d) [~~§97.3(c)~~] of this chapter for failure to comply with paragraph (1) of this subsection.

(B) (No change.)

(6) - (7) (No change.)

(8) DADS may deny issuance of a license for any of the reasons specified in §97.21 of this subchapter [~~chapter~~] (relating to Denial of an Application or a License).

(b) (No change.)

§97.31. Time Frames for Processing and Issuing a License.

(a) General.

(1) In this section, the [~~The~~] date of an application is the date the DADS' Home and Community Support Services Agencies (HCSSA) Licensing Unit receives the application.

(2) DADS considers an application for an initial license complete when DADS receives, reviews, and accepts the information described in §97.13 of this subchapter [~~chapter~~] (relating to Application Procedures for an Initial License).

(3) DADS considers an application for a renewal license complete when DADS receives, reviews, and accepts the information described in §97.17 of this subchapter [~~chapter~~] (relating to Application Procedures for a Renewal License). An [~~The~~] agency may continue to operate in accordance with §97.17(j) [~~§97.17(g)(1)~~] of this subchapter [~~chapter~~].

(4) DADS considers an application for a change of ownership license complete when DADS receives, reviews, and accepts the information described in §97.25 [~~§97.23~~] of this subchapter [~~chapter~~] (relating to Change of Ownership).

(5) DADS considers an application for a branch office license complete when DADS receives, reviews, and accepts the information described in §97.27 of this subchapter [~~chapter~~] (relating to Application and Issuance of a Branch Office License).

(6) DADS considers an application for an alternate delivery site license complete when DADS receives, reviews, and accepts the information described in §97.29 of this subchapter [~~chapter~~] (relating to Application and Issuance of an Alternate Delivery Site License).

(b) Time frames. An application from an agency for an initial, renewal, change of ownership, branch office, or alternate delivery site license is processed in accordance with the following time frames:

(1) - (2) (No change.)

(3) If an agency is subject to a proposed or pending enforcement action on its license on or within 45 [~~30~~] days before the expiration date of the license, DADS may suspend issuance of a renewal license until a formal hearing as described in §97.601 of this chapter (relating to Enforcement Actions) is complete.

(c) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804866
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 438-3734

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §98.15, concerning renewal procedures and qualifications; §98.21, concerning license fees; and §98.82, concerning determinations and actions pursuant to inspections; and proposes new §98.63, concerning peer review, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements.

BACKGROUND AND PURPOSE

The purpose of the amendments, in part, is to implement portions of Senate Bill (SB) 1318, 80th Legislature, Regular Session, 2007. SB 1318, in part, amended Texas Human Resources Code, §103.007, to provide that an applicant for renewal of an adult day care facility license that submits an application for renewal later than the 45th day before the expiration date of the license is subject to a late fee in accordance with DADS rules. The proposed amendments establish the conditions under which an applicant for license renewal would have to pay a late fee and set the amount of the late fee at $25.

The purpose of the amendment to §98.82 is to provide clear direction to adult day care facilities about the procedure for submitting a plan of correction and to establish in rule what the plan of correction must address.

The purpose of new §98.63 is to ensure that adult day care facilities comply with the provisions of Texas Occupations Code, §303.0015, added by SB 993, 80th Legislature, Regular Session, 2007, which relates to nursing peer review, and ensure that employees or contractors of an adult day care facility comply with their professional practice acts or title acts relating to reporting and peer review.

SECTION-BY-SECTION SUMMARY

The amendment to §98.15 updates license renewal procedures and time frames.

The amendment to §98.21 states that an applicant for license renewal that submits an application during the 45-day period ending on the date the current license expires must pay a late fee of $25.

New §98.63 states that a facility must adopt and enforce a written policy to ensure that all professional disciplines comply with their professional practice acts or title acts relating to reporting and peer review.

The amendment to §98.82 updates initial exit conference requirements and time lines and states the issues that an acceptable plan of correction must address.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have significant foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section may have an adverse economic effect on small businesses or micro-businesses, because the amendments and new section implements a late fee of $25 for a license renewal application.

DADS estimates that the number of small businesses or micro-businesses subject to the proposed amendments and new section is less than 362. This estimate is based on DADS records which indicate that of the 432 licensed ADCs, 362 are formed

for the purpose of making a profit, one of the requirements for being a small or micro-business. DADS does not have specific data regarding number of employees and gross receipts to determine how many of these facilities are operated by an entity that would meet the definition of a small or micro-business.

The potential economic impact for a small business is a $25 late fee, but that fee is incurred only if the small business submits a license renewal application later than the 45th day before the expiration of the license. For that reason, DADS projects that there will be minimal economic impact to small businesses subject to these amendments.

Several alternatives were considered in determining how to accomplish the objectives of the proposed rules while minimizing the adverse economic effect on small businesses or micro-businesses. Statute gives DADS the option of assessing a late fee if an adult day care facility does not comply with the rules related to the submission of a renewal application. Therefore, DADS considered not imposing a late fee against a facility that does not comply with the proposed rule. DADS did not consider this option consistent with its responsibility as a regulatory agency and, specifically, determined that this option would not adequately address its needs to have a timely renewal application submitted. DADS considered the use of higher fees and penalty ranges for some violations but determined that a larger amount would be potentially detrimental to small and micro-businesses. DADS also considered the development of a penalty structure that did not take provider capacity into consideration, but determined that this structure would disproportionately affect smaller providers.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is that DADS rules will be in compliance with the law.

Ms. Durden anticipates that there may be an economic cost to persons who are required to comply with the amendments and new section because a late fee may be assessed against a facility for non-compliance. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Hannah Ndika at (512) 438-2133 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-021, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 021" in the subject line.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §98.15, §98.21

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §§103.006, 103.007 and 161.021.

§98.15. Renewal Procedures and Qualifications.

(a) - (b) (No change.)

(c) The submission of a license fee alone does not constitute an application for renewal.

(d) [~~(c)~~] To renew a license, a [~~Each~~] license holder must file an application for renewal with DADS no later than the 45th day [~~at least 45 days~~] before the expiration date of the current license. DADS considers that an application for renewal [~~individual~~] has met the filing deadline [~~filed a timely and sufficient application for the renewal of a license~~], if the license holder:

(1) submits a complete application to DADS, and DADS receives that complete application no later than the 45th day [~~at least 45 days~~] before the expiration date of the current license [~~expires~~]; [~~or~~]

(2) submits an incomplete application to DADS with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS receives the incomplete application and letter no later than the 45th day [~~at least 45 days~~] before the expiration date of the current license; or [~~expires. The missing information must be provided and the application completed within 30 days before the current license expiration date or the application may be denied for failure to provide the required information.~~]

(3) submits a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information to DADS, DADS receives the application later than 45-days before the current license expires, but no later than the expiration date of the license and the license holder pays a late fee in accordance with §98.21(b) of this subchapter (relating to License Fees) in addition to the license renewal fee.

(e) [~~(d)~~] If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in DADS' Regulatory Services Licensing and Credentialing Section within 15 days after the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of DADS that the delay was due to the shipper. It is the license holder's responsibility to ensure that the application is timely received by DADS.

(f) [~~(e)~~] For purposes of Texas Government Code, §2001.054, DADS considers that an individual has filed a timely and sufficient application for the renewal of a license if the license holder's application has met the filing deadlines in subsections (d) and (e) of this section. Failure to file a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(g) An application for renewal filed after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §98.11 of this subchapter (relating to Criteria for Licensing) and §98.13 of this subchapter (relating to Application Disclosure Requirements).

(h) [~~(f)~~] The application for renewal must contain the same information required for an original application and the license fee as described in §98.21 of this subchapter [~~(relating to License Fees)~~].

(i) [~~(g)~~] The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §98.19 of this subchapter (relating to Criteria for Denying a License or Renewal of a License)).

(j) [~~(h)~~] The facility must have an annual inspection by the local fire marshal and must submit a copy of the most current inspection as part of the renewal procedures.

§98.21. License Fees.

(a) The license fee is $50. The license fee for a one-year license issued in accordance with §98.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications) is $25. The fee must be paid with each initial application, change of ownership application, and with each application for renewal of the license. Payment of fees must be by check or money order made payable to the ["~~The~~] Department of Aging and Disability Services [~~Services"~~].

(b) An applicant for license renewal that submits an application during the 45-day period ending on the date the current license expires must pay a late fee of $25 in addition to the license fee described in subsection (a) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804862
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

40 TAC §98.63

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The new section implements Texas Government Code, §531.0055, and Texas Human Resources Code, §§103.006, 103.007 and 161.021.

§98.63. Peer Review.

A facility must adopt and enforce a written policy to ensure that all professional disciplines comply with their professional practice acts or title acts relating to reporting and peer review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804863
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §98.82

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §§103.006, 103.007 and 161.021.

§98.82. Determinations and Actions Pursuant to Inspections.

(a) - (b) (No change.)

(c) At the conclusion of an inspection or survey, the violations are discussed in an exit conference with the facility's management. A written list of the violations is left with the facility at the time of the exit conference. [~~; any~~]

(d) If, after the initial exit conference, additional violation are cited, the violations are [~~that may be determined during review of field notes or preparation of the official final list (when the official final list was not issued at the exit conference) is~~] communicated to the facility within 10 working days [~~in writing within 10 workdays~~] after the initial exit conference. [~~Copies of any narratives or similar papers written to further describe the conditions are furnished to the facility.~~]

[~~(d) Violations found during facility visits are discussed with the facility management and a plan of correction obtained; the violations are furnished in writing to the facility, as well as any supporting narratives.~~]

(e) DADS provides a [~~A~~] clear and concise summary in non-technical language of each licensure inspection, inspection of care, and complaint investigation, if applicable [~~, is provided by DADS~~]. The [~~That~~] summary outlines significant violations noted at the time of the inspection or survey [~~visit~~], but does not include names of clients, staff, or any other information [~~statement~~] that would identify individual clients or other prohibited information under general rules of public disclosure. The summary is provided to the facility at the time the report of contact or similar document is provided.

(f) Upon receipt of the final statement of violations [~~deficiencies~~], the facility has [~~will have~~] 10 working days to submit an acceptable plan of correction to the DADS Regulatory Services regional director. An acceptable plan of correction must address the following:

(1) how the facility will accomplish the corrective action for those clients affected by each violation;

(2) how the facility will identify other clients with the potential to be affected by the same violation;

(3) how the facility will put the corrective measure into practice or make systemic changes to ensure that the violation does not recur;

(4) how the facility will monitor the corrective action to ensure that the violation is corrected and will not recur; and

(5) the date the corrective action will be completed.

(g) If the provider and the inspector cannot resolve a dispute regarding a violation of regulations, the provider is entitled to an information dispute resolution (IDR) at the regional level for all violations. For a violation that [~~which~~] resulted in an adverse action, the provider is entitled to an IDR at either the regional or state office level.

(1) A written request and all supporting documentation must be submitted to the Regional Director, Regulatory Services, for a regional IDR; or to Regulatory Services, Texas Department of Aging and Disability Services, P.O. Box 149030, E-351, Austin, Texas 78714-9030, for a central office IDR, no later than the tenth day after receipt of the official statement of violations.

(2) DADS completes [~~will complete~~] the IDR process no later than the 30th day after receipt of a request from a facility.

(3) Violations deemed invalid in an IDR will be so noted in DADS' records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804864
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 19, 2008
For further information, please call: (512) 438-3734

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 34. REGULATION OF LOBBYISTS

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §34.21

Proposed amended §34.21, published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1669), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804751

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY SERVICES PROGRAMS

SUBCHAPTER A. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §5.6

The Texas Department of Housing and Community Affairs withdraws the proposed amendments to §5.6 which appeared in the July 25, 2008, issue of the *Texas Register* (33 TexReg 5831).

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804867

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: September 8, 2008
For further information, please call: (512) 475-3916

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TITLE 22. EXAMINING BOARDS

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.1

Proposed amended §465.1, published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1773), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804752

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22 TAC §465.18

Proposed amended §465.18, published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1776), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804753

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER F. PHARMACY SERVICES

DIVISION 4. LIMITATIONS

1 TAC §354.1863

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §354.1863, Prescription Requirements, under Title 1, Part 15, Chapter 354, Subchapter F, Division 4, relating to the new federal requirement that written prescriptions for covered outpatient drugs for Medicaid recipients must be executed on tamper-resistant prescription pads. The amendment is adopted without changes to the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4268) and will not be republished.

Background and Justification

Section 7002(b) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 (Public Law 110-28) amends section 1903(i) of the Social Security Act (42 U.S.C. §1936b(i)) by adding new paragraph (23), which states that payment shall not be made for amounts expended for Medicaid-covered outpatient drugs (as defined in section 1927(k)(2)) for which the prescription was executed in written (and non-electronic) form unless the prescription was executed on a tamper-resistant pad. This federal requirement became effective April 1, 2008.

The federal Centers for Medicare and Medicaid Services (CMS) issued implementation guidance through a letter to State Medicaid Directors on August 17, 2007 (SMDL #07-012), at http://www.cms.hhs.gov/SMDL/downloads/SMD081707.pdf). The CMS guidance outlines three criteria for a prescription pad to be considered tamper resistant. The pad must contain one or more industry-recognized features designed to prevent: (1) unauthorized copying of a completed or blank prescription form; (2) erasure or modification of information written on the prescription by the prescriber; and (3) use of counterfeit prescription forms. To be eligible for Medicaid reimbursement, prescription pads must meet one of these three characteristics by April 1, 2008, and must satisfy all three characteristics beginning October 1, 2008. Use of tamper resistant prescription pads is designed to reduce instances of unauthorized, improperly altered, and counterfeit prescriptions.

The CMS guidance sets out exemptions from the tamper-resistant requirement, including drugs provided in nursing facilities, intermediate care facilities for the mentally retarded, and other institutional settings, if the prescription is written as part of a patient's medical record and the order is given by medical staff directly to the pharmacy. Also exempted from the tamper-resistant requirement are e-prescriptions transmitted to the pharmacy, prescriptions faxed to the pharmacy, or prescriptions communicated to the pharmacy by telephone by a prescriber. The tamper-resistant requirement does not apply when a managed care entity pays for the medication.

The CMS guidance indicates that pharmacies may dispense non-compliant written prescriptions on an emergency basis, if the pharmacy obtains a compliant prescription in writing or by telephone, fax, or e-prescription within 72 hours from the time of dispensing.

The implementation guidance from CMS will be included in Medicaid pharmacy policies and the pharmacy provider manual.

Comments

The 30-day comment period ended June 29, 2008. During this period, HHSC received no comments regarding the proposed amendments to this rule.

Legal Authority

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(a), which provides HHSC the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804759
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: September 23, 2008
Proposal publication date: May 30, 2008
For further information, please call: (512) 424-6900

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CHAPTER 372. TEXAS WORKS

The Health and Human Services Commission (HHSC) adopts amendments to §372.2, concerning the meaning of words and terms used in the chapter; §372.404, concerning income HHSC counts when determining eligibility for Temporary Assistance for Needy Families (TANF); §372.753, concerning the difference in determining eligibility for the TANF State Program (TANF-SP) as compared to the TANF Program; and §372.754, concerning the difference in determining the amount of benefits in TANF-SP as compared to the TANF Program, in Chapter 372, Texas Works, without changes to the proposed text as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5450) and will not be republished.

The amendments are adopted to implement Rider 21 of the 2008-09 General Appropriations Act (Article II, Health and Human Services Commission, Rider 21, House Bill 1, 80th Legislature, Regular Session, 2007), which authorizes HHSC and the Office of the Attorney General to increase up to $75 the monthly child support disregard "pass-through" payments to TANF families, effective October 1, 2008. Rider 21 was passed in response to the Deficit Reduction Act of 2005, which authorizes the federal government to waive its share of child support collections (up to $100 per month for one child and $200 per month for two or more children), if the State, when determining eligibility and benefits, passes through and disregards some or all of the monthly child support payments a TANF family may receive.

The amendments are also adopted to correct agency names and rule cross-references made obsolete during the consolidation of health and human services agencies in 2004.

HHSC received no comments regarding adoption of the amendments.

SUBCHAPTER A. OVERVIEW AND PURPOSE

1 TAC §372.2

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 32, which authorizes HHSC to administer financial assistance programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804756
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 1, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 424-6900

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SUBCHAPTER B. ELIGIBILITY
DIVISION 7. INCOME

1 TAC §372.404

Statutory Authority

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 32, which authorizes HHSC to administer financial assistance programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804757
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 1, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 424-6900

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SUBCHAPTER C. ASSOCIATED PROGRAMS
DIVISION 4. TANF STATE PROGRAM

1 TAC §372.753, §372.754

Statutory Authority

The amendments are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 32, which authorizes HHSC to administer financial assistance programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804758
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 1, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 424-6900

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION
SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §§1.1, 1.5, 1.12

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 1, §1.1, concerning Private Donors, §1.5, concerning Contract Monitoring Policy, and §1.12, concerning Administrative Hearings, without changes to the proposal as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5453) and will not be republished.

Section 1.1, concerning Private Donors, is repealed because the subject matter is more appropriately covered in various provisions of the Government Code, Penal Code and the Department's ethics policy. Section 1.5, concerning Contract Monitoring Policy, is repealed because the subject matter is more appropriate as a Department policy. Section 1.12, concerning Administrative Hearings, is repealed because it has been superseded by Chapter 60, Subchapter C of this title, concerning Administrative Penalties.

There were no public comments concerning the adoption of this repeal.

BOARD RESPONSE: The Board approved the final order adopting the repeal of the sections on September 3, 2008.

The repeal is adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; §2306.053(b)(10) which gives the Department the authority to administer federal housing, community affairs, or community development programs, including the low income housing tax credit program; and §2306.053(b)(13) which authorizes the Department to obtain, retain, and disseminate records and other documents in electronic form.

No other statutes, articles, or codes are affected by the adopted repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804805
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: September 28, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 475-3916

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CHAPTER 5. COMMUNITY SERVICES PROGRAMS

SUBCHAPTER B. EMERGENCY NUTRITION AND TEMPORARY EMERGENCY RELIEF PROGRAM

10 TAC §§5.101 - 5.114, 5.116 - 5.121

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 5, Subchapter B, §§5.101 - 5.114 and §§5.116 - 5.121, concerning Emergency Nutrition and Temporary Emergency Relief Program, without changes to the proposal as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5454) and will not be republished.

The subchapter is repealed because the authority for the program was repealed by the 80th Legislature.

There were no public comments concerning the adoption of this repeal.

BOARD RESPONSE: The Board approved the final order adopting the repeal of the sections on September 3, 2008.

The repeal is adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; §2306.053(b)(10) which gives the Department the authority to administer federal housing, community affairs, or community development programs, including the low income housing tax credit program; and §2306.053(b)(13) which authorizes the Department to obtain, retain, and disseminate records and other documents in electronic form.

No other statutes, articles, or codes are affected by the adopted repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804806
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 300. ADMINISTRATION

10 TAC §300.12

The Texas Residential Construction Commission (commission) adopts new §300.12, concerning the rulemaking process before the commission, without changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4945).

The new section is part of a consolidation of rules found in 10 TAC Chapters 300, 301, and 302 undertaken as a part of an agency rule review pursuant to Government Code §2001.039. In this same issue of the *Texas Register*, a repeal of §301.2 removes this language from Chapter 301 in furtherance of the agency's consolidation efforts.

The commission received no comments on the proposed rule.

The new section is adopted pursuant to Property Code §408.001, which provides general authority for the commission

to adopt rules necessary for the implementation of Title 16; Government Code §2001.021, which requires state agencies to prescribe by rule the form of a rulemaking petition; and Government Code §2001.039, which requires periodic agency review of rules.

No other statute, article or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 2008.

TRD-200804858
Susan K. Durso
General Counsel
Texas Residential Construction Commission
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Proposal publication date: June 27, 2008
For further information, please call: (512) 463-3926

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CHAPTER 301. GENERAL PROVISIONS

10 TAC §301.2

The Texas Residential Construction Commission ("commission") adopts the repeal of 10 TAC §301.2, regarding the rulemaking process before the commission, with no changes to the text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4947).

The repeal is part of an overall plan to consolidate rules found in 10 Texas Administrative Code Chapters 300, 301, and 302, undertaken as part of an agency rule review pursuant to requirements of Texas Government Code §2001.39. The repealed text of §301.2 shall be re-adopted as §300.12 in Title 10, Chapter 300 of the Texas Administrative Code, as published in this issue of the *Texas Register*.

The commission received no comments on the proposed repeal.

The repeal is adopted pursuant to Texas Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Texas Property Code and Texas Government Code §2001.39 which requires agencies to periodically review rules.

No other statutes, articles, or codes are affected by this repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-3926

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CHAPTER 303. REGISTRATION
SUBCHAPTER A. REGISTRATION OF BUILDERS

10 TAC §303.20

The Texas Residential Construction Commission (commission) adopts new §303.20, concerning Required Builder/Remodeler Continuing Education, with changes to the proposed text as published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3861). The new section sets forth the requirements for continuing education for all registered builders and remodelers and implements changes to the commission's enabling Act. The new section also describes the continuing education requirements, the procedure for fulfilling them, the process for education sponsors to seek course eligibility and the obligations of the commission in that process. The rule is adopted with non-substantive changes to the published text as described below.

The commission received comments from Ned Munoz on behalf of the Texas Association of Builders (TAB). TAB's comments are discussed herein including whether the commission adopts changes to the proposed text as a result of the comments received. TAB commented and objected to the proposed language in subsection (a)(8). Specifically, TAB objected to the inclusion of the word "business" when describing the type of activities of a residential or builder association for which a registered builder could obtain continuing education credit. TAB contended that the use of the word "business" was an unlawful limitation on the association activities, which implied that a builder could only obtain credit for those association activities involving the business of the organization. TAB asserted that §416.012(d)(8) of the Property Code provided no such limitation. TAB requested that the word "business" be deleted from the proposed subsection (a)(8).

Section 408.001 of the Property Code authorizes the commission "...to adopt rules as necessary for the implementation of this title." This statute provides broad authority for the commission to adopt rules as needed. The commission notes that §416.012(d) of the Property Code employs the word "including" when describing the types of activities for which a builder may receive continuing education credit. According to §312.011(19) of the Government Code, the term "including" is defined as a term of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded. Thus, TAB's implication that the Legislature's omission of the word "business" in §416.012(d)(8) of the Property Code prohibits the commission from employing that word in a subsequent commission rule related to continuing education credit is without merit. The commission also notes that §416.012 of the Property Code authorizes the commission to adopt continuing education rules that not only permit accreditation for the activities listed in subsection (d), but allows the commission to propose and adopt additional rules to include other activities that the commission finds deserving of continuing education credit. As a result of the comment, the commission clarifies this subsection by noting that continuing education credits may be obtained from participation in the activities of a residential or builder association, including committee participation, when those activities pertain to the practice of residential construction. The commission finds that it is reasonable to clarify that the activity must relate to the trade or subject matter of residential construction. The commission concludes that business

activities of a residential or builder association that enhance a registered builder's understanding of changes in residential construction laws, advances in building techniques, and instruction in business management and ethical business practices are worthy of continuing education credit. The commission determines that, for the purposes of this rule subsection, association activities not germane to the practice of residential construction should be not count toward the bulk of statutory continuing education obligations for registered builders. Such non-germane activities include social activities such as picnics or golf tournaments or lobbying activities related to the association's interests, or functions related to day-to-day association operations. The commission, therefore, clarifies that while a builder may receive continuing education credit for participation in the activities of a residential or builder association, including committees, relevant to the practice of residential construction, it may only count one hour of such activities that are not germane to the practice of residential construction toward the five hour total required. The commission has made a clarifying change in response to this comment.

TAB commented on subsection (c)(1) objecting to the proposed rule. TAB asserted that the proposed subsection prohibiting the acquisition of one hour of self study credit for ethics exceeded the commission's statutory authority under the Act.

The commission disagrees with the comment because of the commission's broad statutory rulemaking authority under §408.001 of the Property Code. The commission further notes that §416.012 of the Property Code does not prohibit the commission from adopting rule language prohibiting self-study to satisfy the one hour ethics credit requirement for a registered builder. Section 416.012 of the Property Code merely states the number of ethics credit necessary for a registered builder to maintain good standing with the commission. The statute does not mandate self-study to satisfy the one hour ethics credit requirement. In the absence of this statutory provision, the commission is authorized to adopt the limitation on ethics credit as proposed in this subsection. The commission has made no changes in response to this comment.

TAB commented on subsection (d)(2) and sought clarification of this subsection. TAB understood the intent of the rule language in this subsection was to limit the number of hours for which a builder could receive continuing education credit from participation in the business activities of a trade association. TAB stated that the rule language was ambiguous and could be interpreted to state that only one credit hour of five total hours could be met by participating in any activity of the association. TAB proposed alternative rule language to the commission intended to clear the possible confusion.

The commission does not adopt the suggested language. The commission addressed this issue with its response to the comments to subsection (a)(8). The commission concludes that a builder should earn continuing education credits related to the activities of a trade association as long as those activities are germane to the practice of residential construction. The commission concludes that activities sponsored by a residential or builder association that enhance a registered builder's understanding of changes in residential construction laws, advances in building techniques and instruction in business management and ethical practices should represent the bulk of earned continuing education credits. The commission acknowledges that a residential or builder association can provide significant resources to builders and consumers. The commission clarifies that a registrant can earn one of the five required hours of continuing education through participation in activities of a trade association that pertain to the practice of residential construction.

TAB commented on subsection (i)(8) and offered alternative rule language. TAB suggested that the phrase "or statewide" be inserted between the words "nationally" and "recognized". TAB contends that the inclusion of the alternative language will allow professional organizations that are recognized statewide to be deemed eligible to offer continuing education courses in ethics.

The commission disagrees with the comment because according to §416.012(a) of the Property Code, the commission is authorized to review and recognize continuing education programs for registered builders in this state. There are organizations that offer ethics courses nationally, such as the National Association of Home Builders, which offers educational courses for members of the residential construction industry, and the American Bar Association, which offer courses to its members. The commission's rule allows such nationally offered courses on ethics to be deemed eligible for credit. However, professional organizations operating within this state that seek to offer continuing education courses to registered builders on any topic related to residential construction are subject to an eligibility review of the course material by the commission. Subsection (i)(1) - (6) of this proposed rule are the administrative vehicles by which the commission evaluates eligibility of all continuing education courses to be offered in the state. These courses, under this rule, are to be evaluated by the commission on a case-by case basis. The commission has made no changes in response to this comment.

TAB commented on subsection (n)(1) and stated that the commission had exceeded its authority under §416.012(g) of the Property Code in proposing a continuing education rule that identified a designated individual to be responsible for specific residential construction activities that occur on a job site. TAB suggested that this requirement be removed from the proposed rule.

The commission disagrees with the comment because of the broad rulemaking authority granted to the commission under §408.001 of the Property Code. Moreover, the commission notes that §416.012(g) of the Property Code does not specifically prohibit the commission from adopting a rule requiring that an individual designated to satisfy continuing education requirements for the builder be a person responsible for specific on-site residential construction activities. The commission determines that if a corporation or other business entity is designating an individual other than its registered agent to satisfy continuing education requirements, the subject matter of the course would reasonably best serve a designee whose day-to-day responsibilities at a construction job site are relevant to the proposed course material. The commission has made no changes in response to this comment.

Unrelated to comments received, the commission amended subsection (a)(7) to clarify that credit can be accrued for presenting material on the technical, ethical, or professional management activities to the practice of residential construction or by attending such a presentation, including one made at a meeting of a residential or builder association or organization, or by writing a paper on such a topic for presentation to a group. In addition, the commission has amended subsection (j) to clarify that after having received complete information for a determination of course eligibility, the commission will take certain actions to publish eligible course information on its website.

The new section is adopted pursuant to Property Code §408.001, which provides general authority for the commission

to adopt rules necessary for the implementation of Title 16, Property Code; and Property Code §416.012.

No other statutes, articles or codes are affected by the new section.

§303.20. Required Builder/Remodeler Continuing Education.

(a) A person registered under this subchapter (registrant) must earn at least five hours of eligible continuing education credit in each applicable reporting period as further described in subsections (e) and (f) of this section. A registrant can earn continuing education credit for educational, technical, ethical, or professional management activities related to the practice of residential construction, including:

(1) successfully completing or auditing a course sponsored by an institution of higher education, including a correspondence course;

(2) successfully completing a course sponsored by a professional or trade organization, including a correspondence course;

(3) attending a seminar, tutorial, short course, videotaped course, or televised course on the practice of residential construction;

(4) participating in an in-house course sponsored by a corporation or other business entity;

(5) teaching a course described by paragraphs (1) - (4) of this subsection;

(6) publishing an article, paper, or book on the practice of residential construction;

(7) presenting or attending a presentation on residential construction practices, including technical, ethical, or professional management activities related to the practice of residential construction presented at a meeting of a residential or builder association or organization or writing a paper on such a topic for presentation at the meeting;

(8) participating in the activities of a residential or builder association, including serving on a committee of the organization, that pertain to the practice of residential construction; and

(9) engaging in self-directed study of the practice of residential construction.

(b) Continuing education credit hours are computed based on actual time spent participating in an eligible course, program, or activity.

(c) The continuing education credit hours required per applicable reporting period under this section must include at least:

(1) one hour of ethics, which may not be earned through self-study; and

(2) two hours of education that address:

(A) limited statutory warranties;

(B) building and performance standards; and

(C) requirements of the International Residential Code as adopted under Property Code §430.001 and other statutes and rules that apply to builders Title 16 of the Property Code.

(d) A registrant may not satisfy more than:

(1) two credit hours of the five hour minimum continuing education requirement in a reporting period for engaging in self-directed study, which may be fulfilled by:

(A) reading materials and completing the course work specifically prepared for an accredited course without attending the course;

(B) reading substantive residential construction articles in recognized home builder publications;

(C) viewing videotapes or digital media produced for instruction of the residential construction industry;

(D) listening to audiotapes or digital media produced for instruction of the residential construction industry; and

(E) reading materials specifically designed to instruct professionals on the proper use and installation of materials designed for use in residential construction; and

(2) one credit hour of the five hour minimum continuing education requirement in a reporting period by participating in the activities of a residential or builder association, including serving on a committee of the organization, that pertain to the practice of residential construction.

(e) A registrant that registers with the commission for the first time on or after September 1, 2007:

(1) must earn five hours of continuing education credit within twelve months of the date of the initial registration; and

(2) must earn an additional five hours of continuing education credit every five years thereafter to remain in good standing.

(f) A registrant that was registered with the commission before September 1, 2007 and whose certificate of registration was in good standing on September 1, 2007:

(1) must earn five hours of continuing education credit by August 31, 2012; and

(2) must earn an additional five hours of continuing education credit every five years thereafter to remain in good standing.

(g) Each registrant must timely show proof of completion of the required credit hours in order to renew its registration and to maintain its certificate of registration in good standing.

(1) A course sponsor's failure to timely submit a registrant's proof of attendance at an eligible continuing education course is not an excuse for the registrant's failure to timely report its compliance.

(2) Registrants who fail to comply timely with the minimum continuing education requirements in violation of this section shall be given a notice of the intent to impose a suspension of their certificate of registration or, if the deadline for compliance with the requirements of this section coincides with the registrant's registration renewal deadline, the application for renewal will be denied.

(A) The notice shall clearly state the reason for the action taken under this paragraph and shall provide the registrant 30 days within which to come into compliance with the requirements of this section or to appeal the suspension or denial as stated in the notice.

(B) The notice will be sent to the registrant's official mailing address of record.

(h) Reinstatement of Registration Status.

(1) A registrant whose certificate of registration has been suspended for a violation of this section may seek reinstatement after completing the required continuing education hours for the compliance period by submitting a written request for reinstatement of its certificate of registration.

(2) A registrant whose application for renewal is denied under this section may file an application for late renewal with proof of compliance with this section pursuant to §303.19 of this chapter.

(3) Credit hours earned during the period of non-compliance may not also be reported for credit toward the minimum credit hours required during the next compliance period.

(4) A registrant that fails to timely renew or whose certificate of registration is suspended may not continue to act as a builder or remodeler until their registration has been restored to a status in good standing.

(i) Continuing Education Eligibility Review.

(1) A course, program or activity must be submitted to the commission for review and confirmation of eligibility for credit to fulfill the requirements of this section.

(2) A registrant or course sponsor may submit continuing education credit information to the commission.

(3) The burden of proof that a course, program or activity meets the requirements of this section rests with the sponsor or registrant that submits the request for eligibility review.

(4) Continuing education credit information must be submitted to the commission and may be submitted via:

(A) a commission-approved form with the information as specified in paragraph (7) of this subsection;

(B) if provided by the commission, an internet portal designated for such submission; or

(C) any other attendance submission format approved by the commission.

(5) A separate request is required for each course or program unless it is being repeated in exactly the same format on different dates and locations.

(6) A registrant may submit a request for credit under this section.

(A) For a course not reviewed for eligibility prior to the date of the course, a registrant shall submit a request for credit by submitting a course review form, which must include the name of the course, the name of the course sponsor, a copy of the agenda, the length of each presentation including a brief description of the materials, and if the course is presented by one or more instructors or speakers, a list of speakers and copy of each speaker's curriculum vitae, resume or other evidence of qualifications to teach the subject matter, and a commission approved self-certification of attendance for the requested number of credit hours.

(B) For courses previously reviewed by the commission, a registrant must submit within ninety days from the date the course was attended an attendance form issued by the program sponsor that includes the course name, builder name, builder number, attendee name, attendance date, and commission-assigned course number.

(C) To receive credit for activities related to participation in the activities of a residential or builder association under subsection (a)(8) of this section, the registrant shall submit to the commission written verification of participation on association letterhead from the president or executive officer of the association or its designee.

(7) In order for the commission to list a program or course on its website, a program sponsor must submit its request for review at least 30 days in advance of the course or program and shall:

(A) submit the request on a form provided by the commission;

(B) submit all information and supporting documentation requested on the form, including:

(i) a sample brochure, agenda or program outline that describes the content, identifies the instructors, lists the time devoted to each topic and shows each date and location at which the program will be offered;

(ii) a calculation of the total number of continuing education hour credit to be satisfied by attendance;

(iii) include a method of presentation;

(iv) if the materials will be presented by one or more instructors or speakers, a resume, curriculum vitae, or other evidence demonstrating the qualifications of the instructors or presenters presenting the material; and

(v) registration contact and registration fee information that includes the sponsor's name, telephone and website address.

(8) Ethics courses previously approved and offered by the Texas State Bar Association, a nationally recognized professional organization, or an accredited Texas institution of higher learning are deemed eligible for continuing education credit upon submission of a request for credit.

(j) Within ten business days of receiving complete information for a determination of eligibility for credit of a course submitted by a course sponsor, the commission will:

(1) issue course numbers;

(2) post course or program information and contact information to the commission website, if the course or program is publicly offered; and

(3) provide attendance sheets to the course sponsor.

(k) Credit shall not unreasonably be withheld once complete information for eligibility determination as required under this section is received by the commission.

(l) The commission will remove courses and programs listed on its website within 30 days of receipt of a written request from the course sponsor.

(m) Registrants may not carry forward continuing education credit hours in excess of the required five-hour minimum from one reporting period to the next.

(n) A registrant that is a not an individual must designate an individual to earn the continuing education credit hours required under this section by submitting the name of the designated individual to the commission's registration department on the form provided for submitting earned continuing education credit information.

(1) An individual designated by registrant under this subsection must be either the registrant's primary registered agent or an individual employee involved in on-site construction activities who is responsible for residential construction activities that take place at the residential construction job site, including:

(A) acting as a project manager, superintendent, or foreman;

(B) supervising construction crews or subcontractors;

(C) scheduling the work of construction crews or subcontractors;

(D) inspecting the construction work of crews or subcontractors;

(E) inventorying and inspecting the delivery of construction materials to the job site; or

(F) serving as an in-house construction trainer.

(2) All required credit hours earned in a single reporting period must be earned by the individual designated under this subsection except as provided in paragraph (3) of this subsection or unless undue hardship or good cause is established pursuant to subsection (o) of this section.

(3) If a registrant's designee leaves the employment of the registrant or becomes employed by another registrant, hours of credit earned remain with the original registrant.

(4) If a registrant or a registrant's designee is also an individual designated to earn continuing education credits for Texas Star Builder membership, credits earned under this section can be used as continuing education credit hours to satisfy the requirements of §303.300 of this chapter.

(o) Any registrant that is unable to satisfy the minimum continuing education requirements of this section during any reporting period may request a finding of undue hardship or good cause for failure to comply.

(1) A registrant may seek an extension of time to complete the requirements of this section for failure to comply due to undue hardship caused by illness, medical disability, or other extraordinary or extenuating circumstances beyond the control of the registrant.

(A) A request for extension for undue hardship must be accompanied by substantiating third-party documentation.

(B) An extension for undue hardship will be granted for a period of ninety days, unless a greater extension is approved by the Executive Director.

(2) A registrant that was unable to comply with this section for good cause may submit a request for a waiver of compliance to the Executive Director.

(A) The burden is on the registrant to demonstrate that good cause exists for failure to comply.

(B) A waiver granted by the Executive Director is a final agency decision not subject to further administrative appeal.

(3) Good cause or undue hardship shall not include: financial hardship, lack of time due to professional or personal schedule, or lack of information concerning continuing education requirements.

(4) A course sponsor's failure to timely submit a registrant's proof of attendance is not an excuse for the registrant's failure to timely report its compliance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 9, 2008.

TRD-200804910

Susan K. Durso
General Counsel
Texas Residential Construction Commission
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Proposal publication date: May 16, 2008
For further information, please call: (512) 463-3926

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SUBCHAPTER B. REGISTRATION OF HOMES

10 TAC §303.140, §303.170

The Texas Residential Construction Commission ("commission") adopts amendments to Title 10, Part 7, Chapter 303, Subchapter B, §303.140, relating to the registration of homes in the State of Texas and §303.170, related to administrative penalties for failure to register a home construction project, in accordance with Title 16 of the Texas Property Code and commission rules, with no changes to the proposed text as published in the June 27, 2008, issue to the *Texas Register* (33 TexReg 4947). The commission received no comments on the proposed amendments.

The amendments to §303.140 clarify recent amendments to the agency's policy regarding registration of homes online. The amendments to §303.170 incorporate into the rules recent legislative amendments to the agency's statute and are a part of a rule review under Texas Government Code §2001.39.

The amendments are adopted under Texas Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16; Texas Property Code §401.003, which states the threshold of qualifying projects required to be registered; Texas Property Code §426.003, which requires builders and remodelers to register new residential construction projects; and Texas Government Code §2001.39, which requires all state agencies to periodically review their adopted rules.

The statutory provisions affected by these amendments are those set forth in Texas Property Code, §408.001 and §426.003, and Texas Government Code §2001.39.

No other statutes, articles, or codes are affected by the adoption of these sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-3926

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CHAPTER 304. WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS

SUBCHAPTER B. PERFORMANCE STANDARDS FOR COMPONENTS OF A HOME SUBJECT TO A MINIMUM WARRANTY OF ONE YEAR FOR WORKMANSHIP AND MATERIALS

10 TAC §§304.10, 304.12, 304.14, 304.19, 304.20, 304.25, 304.28, 304.32

The Texas Residential Construction Commission ("commission") adopts amendments to 10 TAC §304.10, the standard for flaking of plaster adhesive on concrete slabs; §304.12, concerning nail pops in drywalls; §304.14, concerning gaps in siding and joints on exterior trim; §304.19, concerning carpet seams, §304.20, concerning the evenness of hard flooring; §304.28, concerning the delaminating of counter top materials; and §304.32 concerning yard grading and standing water after unusually heavy rainfalls, with no changes to the proposed text as published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3864).

The Texas Residential Construction Commission ("commission") adopts amendments to 10 TAC §304.25, concerning interior trim joints, with one grammatical correction to the text as published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3864).

These amendments better define the performance standards for components of a home subject to a minimum warranty of one year for workmanship and materials.

The commission received no comments on the proposed amendments.

The amendments are adopted pursuant to Texas Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of the Act, and §430.001, which requires the commission to adopt building and performance standards for residential construction.

No other statutes, articles, or codes are affected by the adoptions.

§304.25. Performance Standards for Interior Trim.

(a) Performance Standards for Trim.

(1) An interior trim joint separation shall not equal or exceed 1/8 of an inch in width or shall not separate from adjacent surfaces equal to or in excess of 1/8 inch and all joints shall be caulked or puttied. If an interior trim joint fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The interior trim shall not have surface damage, such as scratches, chips, dents, gouges, splits, cracks, warping or cupping that is visible from a distance of six feet or more in normal light due to construction activities. If the interior trim fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A hammer mark on trim shall not be visible from a distance of six feet or more when viewed in normal light. If the interior trim fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) A nail or nail hole in interior trim shall not be visible from a distance of six feet or more when viewed in normal light. If the interior trim fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Shelving. Shelving, rods and end supports shall be installed in accordance with the measurements stated in this subsection. The length of a closet rod shall not be shorter than the actual distance between the end supports in an amount equal to or exceeding 1/4 of an inch and shall be supported by stud-mounted brackets no more than four feet apart. The length of a shelf shall not be shorter than the actual distance between the supporting walls by an amount equal to or exceeding 1/4 of an inch and shall be supported by stud-mounted brackets no more than four feet apart. End supports shall be securely mounted. If the closet rods, shelving or end supports fail to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standard for Cabinet Doors. Cabinet doors shall open and close with reasonable ease. Cabinet doors shall be even and shall not warp more than 1/4 inch when measured from the face to the point of the furthermost point of the door or drawer front when closed. Some warping, cupping, bowing or twisting is normally caused by surface temperature and humidity changes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Durso
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Texas Residential Construction Commission
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1036

The Texas Education Agency (TEA) adopts an amendment to §61.1036, concerning school facilities standards. The amendment is adopted without changes to the proposed text as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5457) and will not be republished. Section 61.1036 establishes standards for new construction or major space renovations on or after January 1, 2004. The adopted amendment adds to the existing facilities standards inspection requirements for portable, modular school buildings, in accordance with House Bill (HB) 1886, 80th Texas Legislature, 2007. The adopted amendment also incorporates other revisions, such as adding several definitions and modifying certain existing definitions.

Through 19 TAC §61.1036, adopted to be effective June 9, 2003, the commissioner exercised rulemaking authority to specify in

rule standards for the construction and adequacy of school facilities. The current provisions include requirements for the certification of the design and construction of school buildings, space and square footage requirements for these buildings, construction quality standards for these buildings, and definitions of applicable terms.

HB 1886, 80th Texas Legislature, 2007, amended the Texas Education Code (TEC), §46.008, relating to school facilities standards, to include requirements that portable, modular buildings for use as school facilities be inspected for compliance with mandatory building codes or approved designs, plans, and specifications. The adopted amendment to 19 TAC §61.1036 incorporates these statutory changes, as well as other updates and revisions, as follows.

Subsection (a) has been revised to include definitions for architect, engineer, and portable, modular building. The paragraphs in the subsection have been renumbered accordingly.

Subsection (f) has been revised to modify the requirements for a qualified building code consultant in paragraphs (1)(A) and (2)(A) and the definition of qualified code inspector in paragraphs (1)(D) and (2)(D). New paragraph (3) has been added to address special provisions for portable, modular buildings. Subsection (f) has also been revised to update the name of a state agency in paragraph (4)(B) and a statutory reference in paragraph (4)(D).

Technical corrections have been made throughout the section to correct references, word usage, and punctuation.

The TEA determined that the adopted amendment will have no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began July 11, 2008, and ended August 11, 2008. No public comments were received.

The amendment is adopted under the TEC, §46.002, which authorizes the commissioner to establish rules as necessary to administer the Instructional Facilities Allotment. The TEC, §46.008, as amended by HB 1886, 80th Texas Legislature, 2007, requires that portable, modular buildings for use as school facilities be inspected to ensure compliance with mandatory building codes or approved designs, plans, and specifications.

The adopted amendment implements the TEC, §46.002 and §46.008.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 4, 2008.

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Texas Education Agency
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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 140. DISPUTE RESOLUTION--GENERAL PROVISIONS

28 TAC §§140.6 - 140.8

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts new §140.6, concerning Subclaimant Status: Establishment, Rights, and Procedures, new §140.7, concerning Health Care Insurer Reimbursement under Labor Code §409.0091, and new §140.8, concerning Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091. The new sections are adopted with changes to the proposed text as published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3377).

The adopted sections are necessary to implement the statutory provisions of House Bill (HB) 724 enacted by the 80th Legislature, Regular Session, 2007. HB 724 created new Labor Code §409.0091, which authorizes "health care insurers" to seek reimbursement from a workers' compensation insurance carrier for health care paid by the health care insurer for work related, compensable injuries.

Labor Code §409.009 is a general provision establishing the basic requirements for subclaim status and applies to all subclaimants. The Labor Code and court cases establish and clarify the obligation and authority of the Division to provide dispute resolution to subclaimants. Labor Code §408.021 entitles an injured employee who sustains a compensable injury to all health care reasonably required by the nature of the injury. Labor Code §413.015 requires insurance carriers to pay charges for medical services. Labor Code §413.031 provides certain procedures for certain requestors of medical dispute resolution. Labor Code Chapter 410 governs proceedings to determine the liability of an insurance carrier for compensation for an injury under the Workers' Compensation Act. Labor Code §402.061 authorizes the Commissioner of Workers' Compensation to adopt rules as necessary to implement and enforce the Workers' Compensation Act. Labor Code §402.0111 authorizes the Commissioner of Workers' Compensation to exercise all executive authority, including rulemaking authority, under the Labor Code and laws of this State. The courts have established that subclaimants may not file suit until they have exhausted their administrative remedies. *In re Texas Mutual Insurance Company, 157 S.W. 3d 75.*

Prior to 2007, there were no distinctions among subclaimants or classes of subclaimants. HB 724, in 2007, enacted §409.0091, which established specific rules and procedures for one class of subclaimants: health care insurers who have claims based on data matches with the Division.

Section 409.0091 specifies some procedures but requires the Commissioner of Insurance and the Commissioner of Workers' Compensation to adopt or modify rules as necessary to: (1) allow a "health care insurer" access as a subclaimant to the appropriate dispute resolution process; (2) recognize the status of a subclaimant as a party to a dispute; (3) ensure that a workers' compensation insurance carrier is not penalized for denying payment in order to get additional information; (4) specify the process by which an employee who has paid for health care ser-

vices may seek reimbursement; and (5) clarify the processes required by, that fulfill the purpose of, and assist the parties in the proper adjudication of subclaims under §409.0091.

In response to written comments received from interested parties and further staff review of the proposal, the Division has changed some of the proposed language in the text of the rule as adopted. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

Throughout the rule text, the term "workers' compensation carrier" has been changed to "workers' compensation insurance carrier" to be consistent with statutory terminology. Also, throughout the rule text, the term "employee" is changed to "injured employee" to more accurately identify employees in the system.

Section 140.6(b) was deleted because the definition of health care insurer was not needed in §140.6.

Section 140.6(c) was relettered §140.6(b) and the phrase "as described in §409.009" was added to clarify the term "subclaimant."

In §140.6(c)(2)(D) a requirement was added that a subclaimant must provide the injured employee with written notice of the intent to pursue a claim for reimbursement of a benefit. This is in response to comments that raised concerns about a subclaimant proceeding to a hearing without the participation of the injured employee.

In §140.6(c), the heading was amended to read "Rights in Relation to the Injured Employee" to more accurately describe the subsection.

In §140.6(d), language was added to clarify that subclaimants other than those described in §409.0091 must use the procedures in that subsection.

New §140.6(d)(2) was added to provide that a health care insurer subclaimant must submit a reimbursement request in the form/format and manner prescribed by the Division. The purpose of this change is to provide guidance on the procedure to be used in this category of claims.

New §140.6(d)(3) was added to provide that workers' compensation insurance carriers must process reimbursement requests under this section pursuant to Chapters 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guidelines for Medical Services, Charges, and Payments). The purpose of this change is to provide guidance on the procedure to be used in this category of claims.

Proposed §140.6(e)(2) was deleted because it was inaccurate because of the applicability provisions in §140.8(a).

Section 140.7(b) was relettered §140.7(a) and a heading "Applicability" was inserted. This is consistent with the structure of §140.6 and §140.8.

Section 140.7(a) was relettered §140.7(b) and the definition of "Health care insurer" was reworded to use the precise statutory language in §409.0091. This was in response to comments that we had deviated from the statutory language in §409.0091(a) and questions about the significance of that change.

Section 140.8(a) as adopted states that this section applies only to subclaims by a health care insurer based on information received under Labor Code §402.084(c-3). It was inserted to be consistent with the structure of §140.6 and §140.7 and to respond to comments that §140.8 should only apply to subclaimants recognized in §409.0091.

Proposed §140.8(a) was relettered to §140.8(b) and subsequent subsections were relettered accordingly. In adopted §140.8(b) the language of the definition of "Health care insurer" was reworded to use the precise statutory language in §409.0091. This was in response to comments that we had deviated from the statutory language in §409.0091(a) and questions about the significance of that change.

Section 140.8(c) is relettered to §140.8(d). In §140.8(d)(2) the following sentence is deleted because of comments that the requirement was unworkable: "A request for medical information must be for information that is contained in or in the process of being incorporated into the employee's medical billing record maintained by the health care insurer."

In adopted §140.8(d)(2), the term "agent" was replaced with "authorized representatives" in response to comments that "authorized representatives" more accurately identifies persons involved in this process.

In adopted §140.8(d)(2), the sentence "A workers' compensation carrier shall not be held responsible or otherwise penalized for the costs of obtaining additional information if the workers' compensation carrier denies payment in order to move to dispute resolution to obtain additional information to process the request" was replaced with "A workers' compensation insurance carrier shall not be penalized, including not being held responsible for the costs of obtaining additional information if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request." The sentence was reworded to use the precise statutory language in §409.0091. This was in response to comments that we had deviated from the statutory language in §409.0091(l) and questions about the significance of that change.

Section 140.8(e)(1)(E) clarifies that "If the claim is compensable" then, the notice shall include an explanation that the claim is compensable and that the health care provider must reimburse the injured employee for any amounts paid to the health care provider by the injured employee.

Section 140.8(e)(2) clarifies that the explanation of benefits must provide sufficient explanation regarding the basis for a denial of the reimbursement request.

Section 140.8(h)(1)(B) clarifies that a health care insurer may pursue dispute resolution to obtain an order from a hearings officer regarding compensability or eligibility for benefits in accordance with Labor Code Chapter 410 and applicable Division rules. The new language more accurately reflects the language in §409.0091(m).

Adopted §140.6 establishes the procedures that apply to all subclaimants, including health care insurers. Subsection (a) specifies that §140.6 applies to a subclaim under Labor Code §409.009. Subsection (b) specifies that a subclaimant is a party to a claim concerning workers' compensation benefits. Subsection (c) specifies a subclaimant's rights in relation to the injured employee and the circumstances in which a subclaimant may pursue a claim for reimbursement of a benefit without the participation of the injured employee. Subsection (d) provides that subclaimants who are not described in §409.0091 must pursue a claim for reimbursement of medical benefits and medical dispute resolution under Chapters 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guide-

lines for Medical Services, Charges, and Payments). A health care insurer must submit a request in the form and manner prescribed by the Division. Workers' compensation insurance carriers must process requests from subclaimants pursuant to Chapters 133 and 134 of this title. Subsection (e) provides for a subclaimant to pursue a contested case hearing under Chapters 140 - 143 of this title (relating to Dispute Resolution).

Adopted §140.7 applies to health care insurers under Labor Code §409.0091. Subsection (a) specifies that this section only applies to subclaims by a health care insurer based on information received under Labor Code §402.084(c-3). Subsection (b) defines the term "health care insurer" as an insurance carrier and an authorized representative of an insurance carrier, as described by Labor Code §402.084(c-1). Subsection (c) provides for the reimbursement of health care insurers for medical benefits provided to or paid on behalf of an injured employee with a compensable workers' compensation claim in accordance with §409.0091 and §140.7 and §140.8 of this title. Subsection (d) specifies that it is not a defense to a subclaim by a health care insurer under §409.0091 that: (1) the health care insurer has not sought reimbursement from a health care provider or the health care insurer's insured; (2) the health care insurer or the health care provider did not request preauthorization under §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) or Labor Code §413.014; or, (3) the health care provider did not bill the workers' compensation insurance carrier, as provided by §408.027, before the 95th day after the date the health care for which the health care insurer paid was provided.

Adopted §140.8 establishes the process for health care insurers seeking reimbursement from a workers' compensation insurance carrier when pursuing a claim for reimbursement of medical benefits under §409.0091. Subsection (a) states that this section only applies to subclaims by a health care insurer based on information received under Labor Code §402.084(c-3). Subsection (b) defines the term "health care insurer." Subsection (c) provides that a health care insurer seeking reimbursement must first file a reimbursement request with the workers' compensation insurance carrier. Subsection (c)(1) sets forth the procedure for filing a reimbursement request with the workers' compensation insurance carrier. The form used for the reimbursement request must be the form prescribed by the Division and must contain all the required elements listed on the form. Subsection (c)(2) also requires the health care insurer to provide a notice of the reimbursement request to the injured employee and the health care provider that performed the services that are the subject of the reimbursement request. Subsection (d) sets forth the deadlines for responding to the request for reimbursement and establishes criteria for the workers' compensation insurance carrier when requesting additional information from the health care insurer for processing the reimbursement request. Any request by the workers' compensation insurance carrier for additional information shall be in writing and be relevant and necessary for the resolution of the request. A workers' compensation insurance carrier shall not be held responsible or otherwise penalized for the costs of obtaining additional information if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request. Subsection (d) also establishes that it is the health care insurer's obligation to furnish its authorized representatives with any information necessary for the resolution of a reimbursement request. The Division considers any medical billing information or documentation possessed by the health care insurer or one of its authorized representatives to be simultaneously possessed by the health care insurer and all of its authorized representatives. If the workers' compensation insurance carrier has requested information from the health care insurer, the carrier must respond to the request for reimbursement within 120 days after the date the request was first received.

Section 140.8(e) provides that a workers' compensation insurance carrier must either pay, reduce, or deny a reimbursement request and provides the procedures to follow with each response. Subsection (f) requires a health care provider to refund to the injured employee all payments received from the injured employee for care relating to the claim within 45 days of receipt of the notice that the claim is compensable. Subsection (g) sets forth the procedures for filing notice of subclaimant status if the reimbursement request is not accepted in its entirety. Subsection (h) sets forth the procedures for filing a request for dispute resolution, based on the reasons for the denial of the reimbursement request. Subsection (i) sets forth the procedures when multiple entities seek reimbursement for the same services.

Proposed §140.6

Comment: Commenter states that allowing a subclaimant to pursue a non-compensable claim without the involvement or agreement of the injured employee is not contemplated by the statute and could be prejudicial to the injured employee. The commenter further states that there is no provision for the concept of "reasonable diligence" in circumventing the statute or creating new entitlements through administrative rulemaking and the rule, as written, permits a subclaimant to pursue a workers' compensation claim rather than a subclaim. The statute does not allow the conversion of a subclaim to an independent claim in the manner contemplated by the adopted rule. The commenter also states that these aspects of the rule are beyond the provisions of the statute and would be outside the authority of the Division to implement.

Agency Response: The Division disagrees. Section 409.009 allows persons who provide compensation (directly or indirectly) to file a claim if they have sought and been refused reimbursement from a workers' compensation insurance carrier. In any dispute the injured employee is required to be given notice at that injured employee's last known address of record. If the injured employee has an objection to the timing of the hearing, the injured employee may request a continuance. Newly adopted §140.6 affords safeguards for the injured employee that did not previously exist by rule.

Comment: Commenter states that the rules are deficient because they do not provide a method for a subclaimant to declare whether they are seeking reimbursement under §409.0091 or §409.009 and that they do not ensure that only compensable injuries within the allowed time frames are submitted for dispute resolution under §409.0091.

Agency Response: The Division disagrees that the rules are deficient because no such exclusive remedy language is contained in either §409.009 or §409.0091. Furthermore, §140.7 and §140.8 specifically implement the provisions, including time frames, of §409.0091. The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer and §409.009 was not amended to exclude §402.084(c-1) health care insurers.

Comment: Commenter states that the rule allows for inclusion of a health care insurer's authorized agent. This grants a right

to subclaimants not provided for under §409.0091, and also to an individual that does not have the rights of a subclaimant. The commenter further states that the rule as proposed disregards the applicability of §409.0091 to a defined set of claims in time and grants dispute resolution rights to subclaimants and individuals who are not granted those rights in statute. The commenter also states that §409.009 applies to all qualifying subclaims as of September 1, 1993; and, that §409.0091 is limited to compensable injuries occurring after September 1, 2007, or are the result of a data match under §402.084(c-3) between September 1, 2005 and January 1, 2007, as long as it was filed with the Division by March 1, 2008.

Agency Response: The Division agrees in part and has deleted proposed subsection (b) for clarification purposes. If an authorized representative meets the definition of subclaimant under §409.009, they necessarily have all rights a §409.009 subclaimant. If they do not meet the definition of a §409.009 subclaimant, the authorized representative is limited to pursuing only that which is allowed under §409.0091.

The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Comment: Commenter states the proposed rule ignores the separate and distinct nature of a dispute under §409.009 as opposed to §409.0091, including applicability to different parties, the different standards for filing a claim, different time periods for the claims, and different defenses available. The commenter states that while §409.009 does recognize a health care insurer, it does not recognize the right of their authorized representative, as does §409.0091. The commenter further states that when the authorized representative is merely a debt collector who has not provided any benefits, that representative would have no standing under §409.009. The commenter asserts that the rule allows a health care insurer under §402.084(c-1) and an authorized representative to pursue a claim under §409.009 and that there is no statutory authority to apply §402.084(c-1) to §409.009, nor to grant subclaim status to an authorized representative. The commenter states that to allow an authorized representative subclaim status is in direct conflict with §409.009 and that the rule ignores the differences as to who may be a subclaimant under §409.009 versus §409.0091.

Agency Response: The Division disagrees the rule ignores any provisions of §409.009 or §409.0091. No exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

If the authorized representative meets the definition of subclaimant under §409.009, they necessarily have all rights which a §409.009 subclaimant has, which includes pursuing a claim for compensability. If they do not meet the definition of a §409.009 subclaimant, the authorized representative is limited to pursuing only that which is allowed under §409.0091.

Comment: Commenter states that health care insurers have a direct legal interest in proceedings related to compensability, extent of injury, and liability of the workers' compensation claim if they have paid for health care. Such an insurer becomes the pro tanto owner of the claim to the extent of its subrogation interest. The commenter states that a subclaimant may request a benefit review conference pursuant to §141.1 of this title regardless of action or inaction by the injured employee. An injured employee's position that an injury is not compensable is not binding on the health care insurer. The commenter also states that subclaimant rights are created by statute, the health insurance policy itself, and by common law. Further, the rule as proposed fails to recognize that health care insurers have subrogation rights that are allowed under policy forms approved by the Texas Department of Insurance, Division of Life, Health and Licensing. Texas Department of Insurance has approved health care insurer policy language granting insurers the right to pursue third party reimbursement through coordination of benefits and subrogation actions with or without the express permission of the health plan member. Once a health care insurer pays health insurance benefits on an insured member, it is entitled to all the rights of the injured employee and cannot be bound by an agreement it wasn't a party to, a decision by the injured employee not to pursue benefits, or any decision by the Division it was not a party to.

Commenter states that proposed §140.6 establishes new barriers to health care insurers seeking dispute resolution which may unfairly effect the rights of a health care insurer to dispute a denial of compensability or issues on extent of injury. The commenter further asserts that the proposal to subject these subclaimants to prior agreements made by the injured employee, or to require the subclaimant to establish the level of participation of the injured employee in dispute resolution, are contrary to existing law and to superimpose a requirement (that an injured employee is not pursuing with reasonable diligence) to redress these contract rights is to rewrite the contract between the health care insurer and employer or individual.

Agency Response: The Division disagrees with the comment and declines to make a change. The Division agrees that some health care insurers may have a direct legal interest in a workers' compensation claim, but disagrees with commenters' assertion that a subclaimant health care insurer is entitled to dispute resolution regardless of action or inaction by the injured employee.

It is accurate to state that a health care insurer has an interest in proceedings related to claims for which they have paid health care, and that a health care insurer's rights are created by statute, the terms of the policy, and common law. Subrogation is a remedy in courts of equity by which the court places one party, to whom a legal right does not belong, into the shoes of another party for the purpose of doing justice. However, the Division's appeals process is not a court of equity, and the Division has not been given the opportunity to create rules based solely on equitable principals. Instead, the Division's rules must be based on statutes, and §§140.6 - 140.8 implement §409.009 and §409.0091. In §§140.6 - 140.8, the Division has not attempted to interpret or promulgate rules based on the language in health care insurer policies or the common law.

Labor Code §410.030(b) provides that a signed agreement: "...is binding on the claimant, if represented by an attorney, to the same extent as on the insurance carrier. If the claimant is not

represented by an attorney, the agreement is binding on the claimant through the conclusion of all matters relating to the claim while the claim is pending before the division, unless the commissioner for good cause relieves the claimant of the effect of the agreement." A health care insurer may obtain the rights of the injured employee once it provides health care to an injured employee; however, pursuant to Labor Code §410.030(b), once an injured employee has signed an agreement, he or she is bound by the agreement and does not have the right to ignore that agreement, so there is no longer a right to pass on to the health care insurer. Pursuant to Labor Code §410.205, "a decision of the appeals panel regarding benefits is final in the absence of a timely appeal for judicial review." Once an injured employee receives a final decision from the appeals panel he or she is bound by the decision and does not have the right to ignore that decision, so there is no longer a right to pass on to the health care insurer.

The Division notes that §§140.6 - 140.8 do not attempt to restrict or limit the rights a health care insurer has under other statutes, the terms of an insurance policy, or common law. If a health care insurer chooses to pursue the remedies available under §409.009 and §409.0091, it must comply with Title 5 of the Labor Code and Division rules. However, the health care insurer is not precluded from pursuing other remedies available under other statutes, the terms of an insurance policy, or common law instead.

Proposed §140.6(a)

Comment: Several commenters state that HB 724 created new §409.0091, which addressed certain health care insurer subclaimants, as defined in §402.084(c-1), and that §409.009, which was not amended by HB 724, no longer applies to this type of health care insurer subclaimant. The commenters also state the proposed rule creates a conflict by giving all health care insurers the same rights and remedies that §409.0091 grants to only those health care insurers that meet the definition found in §409.0091. The commenters state that there are different filing requirements, different remedies available and different defenses to the subclaim under the two different statutes. The commenters also state that there is no statutory authority for conflating the special statutory features of certain health care insurer subclaimants and their authorized representatives with those of other types of subclaimants. The commenters state HB 724 did not amend §409.009(e) and although that section contains the term "health care insurer," it does not include or reference "an authorized representative" of an insurance carrier in the way that the definition in §409.0091(a) does. The commenters state that based on the Texas Government Code §311.026(b), §409.0091 is more specific in its definition and includes specific rights and remedies for "health care insurers;" therefore, it must prevail over the general §409.009.

Commenter states that HB 724 also amended Labor Code §408.027(d) to specifically state that there are two paths--§409.009 and §409.0091--for other types of "accident or health insurance carriers" to take where a claim has not been disputed for compensability. Commenter asserts that the Texas Legislature intended significant distinction between the term "...health insurance carrier" as stated in §408.027(d) and the HB 724 addition of new Labor Code provision §409.0091(a) which defines a "health care insurer." Therefore, a "health care insurer" may not recover reimbursement from the workers' compensation insurance carrier in the manner described by §409.009 or §409.0091 because its process is set forth only in §409.0091.

One commenter states that, in addition, "authorized representatives" of §402.084(c-1) health care insurers do not qualify to be a subclaimant under §409.009 since they did not "provide compensation" as required by statute and that health care insurers and their authorized representatives lack standing to litigate a compensability dispute pursuant to Section 11 of HB 724 which limits their subclaims to "an injury that has not been denied for compensability or that has been determined by the division to be compensable." Several commenters recommend the following applicability language for §140.6:

"(a) Applicability. This section is applicable to a subclaim pursued under §409.009, including a subclaim pursued by a health care insurer, except for a health care insurer defined by §409.0091(a) as an insurance carrier and an authorized representative of an insurance carrier as described by §402.084(c-1)."

Agency Response: The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

If the authorized representative meets the definition of subclaimant under §409.009, they necessarily have all rights which a §409.009 subclaimant has, which includes pursuing a claim for compensability. If they do not meet the definition of a §409.009 subclaimant, the authorized representative is limited to pursuing only that which is allowed under §409.0091. However, in order to avoid confusion, the §402.084(c-1) definition is removed from §140.6.

Comment: Commenter asserts that the proposed rule is inconsistent with the plain language of the statute and §409.009 grants no more than a right to file a claim and not a right to dispute resolution. Commenter recommends that if the adopted rule is adopted, §140.6 should specifically state that it is not applicable to network claims in which the health care provider was not part of the insurance carrier's workers' compensation health care network. Commenter states that an insurance carrier in a workers' compensation health care network has no liability for medical care or treatment rendered outside the network. Section 409.009 does not grant any right contrary to the network provisions and Insurance Code §1305.003(b) specifically indicates that in the event of a conflict between the Insurance Code and the Labor Code, the Insurance Code controls.

Commenter states that no subclaimant should be allowed to raise issues of "waiver" by the workers' compensation insurance carrier. A claim that is compensable solely as a result of "waiver" is not a claim for which a health care insurance carrier should be relieved of its own contractual obligation to pay.

Agency Response: The Division disagrees with the comment and declines to make a change. It is accurate to state that a health care insurer has an interest in proceedings related to claims for which they have paid health care, and that a health care insurer's rights are created by statute, the terms of the policy, and common law. Subrogation is a remedy in courts of equity

by which the court places one party, to whom a legal right does not belong, into the shoes of another party for the purpose of doing justice. However, the Division's appeals process is not a court of equity, and the Division has not been given the opportunity to create rules base solely on equitable principals. Instead, the Division's rules must be based on statutes. Sections 140.6 - 140.8 implement §409.009 and §409.0091. In §§140.6 - 140.8, the Division has not attempted to interpret or promulgate rules based on the language in health care insurer policies or the common law.

Labor Code §410.030(b) provides that a signed agreement: "...is binding on the claimant, if represented by an attorney, to the same extent as on the insurance carrier. If the claimant is not represented by an attorney, the agreement is binding on the claimant through the conclusion of all matters relating to the claim while the claim is pending before the division, unless the commissioner for good cause relieves the claimant of the effect of the agreement." A health care insurer may obtain the rights of the injured employee once it provides health care to an injured employee; however, pursuant to Labor Code §410.030(b), once an injured employee has signed an agreement he or she is bound by the agreement and does not have the right to ignore that agreement, so there is no longer a right to pass on to the health care insurer. Pursuant to Labor Code §410.205, "a decision of the appeals panel regarding benefits is final in the absence of a timely appeal for judicial review." Once an injured employee receives a final decision from the appeals panel he or she is bound by the decision and does not have the right to ignore that decision, so there is no longer a right to pass on to the health care insurer.

The Division notes that §§140.6 - 140.8 do not attempt to restrict or limit the rights a health care insurer has under other statutes, the terms of an insurance policy, or common law. If a health care insurer chooses to pursue the remedies available under §409.009 and §409.0091, it must comply with Title 5 of the Labor Code and Division rules. However, the health care insurer is not precluded from pursuing other remedies available under other statutes, the terms of an insurance policy, or common law instead.

The Division disagrees that §409.009 only grants a right to file a written claim without the right to take any kind of action regarding that claim. The Labor Code and court cases establish and clarify the authority and obligation of the Division to provide administrative relief in the form of dispute resolution to resolve disputed claims.

Section 409.009 places no limitations or restrictions on arguments, defenses, or legal theories which a subclaimant may bring. Likewise, a subclaimant is subject to any defenses which the workers' compensation carrier may have against the injured employee. Section 409.0091 specifically limits defenses available to the workers' compensation carrier, but does not limit arguments or legal theories available to the health care insurer.

Proposed §140.6(b)

Comment: A commenter asserts that §140.6(b) is an attempt to engraft concepts contained in §409.0091 onto §409.009 and that the legislature would have done so explicitly had that been their intention. The commenter states a comparison should be made to §410.006, which explicitly provides that either a carrier or a claimant may be "represented" by another individual; however, that representative does not become a party to the dispute.

Commenter states the rule of statutory construction, *expressio unius est exclusio alterius*, "provides that the inclusion of a specific limitation excludes all others." *Continental Cas. Ins. Co. v. Functional Restoration Associates*, 19 S.W.3d 393 (Tex. 2000). That case noted that where the Workers' Compensation Act provided a right to appeal to judicial review in one context (i.e., indemnity and compensability issues), and did not in another (specifically appeals of medical review issues), the courts could not read into the statute such a right. It was only after a subsequent legislative amendment that the parties were granted the right to appeal medical review issues to the courthouse. Further, the commenter states, §409.0091 provides that "health care insurer" includes "an authorized representative of an insurance carrier" and because §409.009 does not, *expressio unius est exclusio alterius*, precludes such a construction.

The commenter states §409.0091 is the legislature's circumvention of the prohibition against assignment of benefits as provided by §408.202. Commenter states medical benefits under §401.011(5) may not be assigned to another party and that §409.0091 provides a very specific exception, while §409.009 does not.

The commenter states that any attempt to expand the definition of "health care insurer" under §409.009 is clearly in excess of the grant of authority given to the Division by the legislature. *Fulton v. Associated Indemnity Corp.*, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied). The commenter also states that §402.084(c-1) is explicit that "insurance company" is defined as noted "for purposes of this section only." It is only by the explicit incorporation of this section by §409.0091 that the limitations of §402.084(c-1) are ignored. No such incorporation is included in §409.009.

Agency Response: The Division disagrees that the adopted rule is an attempt to engraft concepts contained in §409.0091 onto §409.009. If an authorized representative meets the definition of subclaimant under §409.009, they necessarily have all rights of a §409.009 subclaimant. If they do not meet the definition of a §409.009 subclaimant, the authorized representative is limited to pursuing only that which is allowed under §409.0091. However, as previously stated, in order to avoid confusion the Division removed the §402.084(c-1) definition from §140.6.

Proposed §140.6(c)

Comment: The commenters state the issue of party status under §409.009 has not been definitively established and the uncertain status of the subclaimant was specifically addressed by the Legislature with §409.0091 but not in §409.009. Additionally, this subsection makes a potential subclaimant a party to the entire claim even though the person has not yet asked for reimbursement from the insurance carrier. The commenters recommend deleting §140.6(c) and moving the language to §140.7.

Another commenter proposes the following language for this subsection:

"(b) Subclaimant status. A person who has provided compensation to or for an employee or legal beneficiary may become a subclaimant if the person has sought and been denied reimbursement by the workers' compensation."

Agency Response: The Division disagrees in part that the issue of party status has not been established but adopted §140.6(b) has been amended in order to clarify and avoid confusion.

Comment: Commenter states that §409.009 is found in Chapter 409 and *not* Chapter 410, which deals with adjudication of

disputes. The only other section that specifically allows a contested case hearing is §413.0311 and this section *explicitly* incorporates the *manner* provided for Chapter 410 proceedings. It does not incorporate any substantive rights. Section 409.0091 arguably also allows for a contested case hearing; however, it is only by virtue of subsection (l) that a subclaimant is granted "party" status under §409.0091. Section 409.009 contains no similar provision extending to the subclaimant "party" status. If §409.0091 grants "party" status and §409.009 does not, the Division is *precluded* from doing so as this is to be considered a clear expression of legislative intent.

Agency Response: The authority of the Division to provide dispute resolution to subclaimants is fully discussed in the Reasoned Justification portion of this preamble. Section 409.0091(l) provides, in part, that "The commissioner of insurance and the commissioner of workers' compensation shall modify rules under this subtitle as necessary to allow the health care insurer access as a subclaimant to the appropriate dispute resolution process." "This subtitle" is the entire Texas Workers' Compensation Act.

If a health care insurer meets the definition of subclaimant under §409.009, they necessarily have all rights which a §409.009 subclaimant has, which includes pursuing a claim for compensability. If they do not meet the definition of a §409.009 subclaimant, the health care insurer is limited to pursuing only that which is allowed under §409.0091. This is consistent with Division Appeals Panel decisions.

Comment: Commenters state that §140.6(c) conflicts with §409.009 and Division Appeals Panel decisions, which have established that a person that has paid compensation may become a subclaimant only if the person has filed a request for reimbursement with the insurance carrier and has been denied reimbursement. Commenters also state a person that has paid compensation is not automatically a party to the claim just by virtue of the fact that the person has paid or provided benefits. This rule will be disruptive to the dispute resolution process because it automatically gives subclaimant status and due process requires all parties be given notice and the opportunity to be heard and present evidence. Commenter states that it is not discretionary for a person to seek reimbursement before becoming a subclaimant, it is mandatory under §409.009. Commenter recommends §140.6(c) should be amended to read: "(c) Subclaimant Status. A person who has provided compensation under §409.009 may become a subclaimant if the person has sought and been refused reimbursement from the insurance carrier."

Agency Response: The Division disagrees in part with this comment. Subsection 140.6(c) is not intended, nor should it be read, to state that anyone can establish subclaimant status without meeting the requirements of §409.009. Section 140.6(c) simply recognizes the status of a subclaimant as a party. It does not define subclaimant.

Proposed §140.6(d)

Comment: Commenter states that since the rule allows a subclaimant to pursue a claim without an injured employee's participation, the injured employee has the risk of loss of lifetime entitlement to both medical and indemnity benefits.

Agency Response: In any dispute, the injured employee is required to be given notice at that injured employee's last known address of record. If the injured employee has an objection to the timing of the hearing, the injured employee may request a continuance. New §140.6 affords safeguards for the injured employee that did not previously exist and adopted §140.6(c)(2)(D) and (c)(3)(A) are added to the rule to require a subclaimant to provide the injured employee with written notice of the intent to pursue a claim for reimbursement of a benefit and to show the subclaimant has met this requirement at a contested case hearing.

Comment: Commenters recommend a one year timeline to pursue a written request for reimbursement with the insurance carrier even though this requirement is not included in §409.009. Other commenters recommend a time limit be imposed on how long a person can have subclaimant status. The commenters state the Division has authority to adopt such a deadline as confirmed by the Texas appellate courts in *Hospitals and Hospital Systems v. Continental Casualty Company and Patient Advocates of Texas v. TWCC.* A commenter recommends the Division adopt a 90 day time limit for the insurance carrier to respond to a request for reimbursement, and a 120 day deadline for the subclaimant to request dispute resolution after the response or failure to respond. The commenters recommend the following language:

"(1) A person who has provided compensation under §409.009 shall file and pursue a written request for reimbursement with the insurance carrier within one year of the date that the compensation was paid or otherwise provided by the person."

Agency Response: The Division disagrees with these comments. Although there are statutory limitations in §409.0091 on time limits for filing a claim for reimbursement and bringing a case to dispute resolution which are reflected in §140.7 and §140.8, there are no statutory deadlines for filing under §409.009.

Comment: Commenters state that §409.009 does not limit a subclaimant to pursue reimbursement for only medical benefits and recommends §140.6(d) should be amended to read, *"A subclaimant may pursue a claim for reimbursement of a compensation benefit..."*

Agency Response: The Division agrees. Adopted §140.6(c)(1) and (2) have been revised and the term "compensation" has been deleted. The text now states "reimbursement of a benefit" as the term "benefit" is defined in Labor Code §401.011(5).

Comment: Commenter states health plans are concerned with a health plan's ability to recoup payments for care that should have been covered through workers' compensation. The commenter states that health plans should be able to pursue dispute resolution regardless of the actions taken by an injured employee. Additionally, the commenter states the rule creates a barrier to establishing the legitimacy of a claim by making their actions contingent on the actions of the injured employee. The commenter also states that the obligation to protect enrollees extends to enrollees covered by a health plan and recommends that the Division either:

(a) eliminate sections of the proposed rule that would limit the ability of plans to independently pursue dispute resolution; or

(b) make clear that not pursuing with "reasonable diligence," the proposed standard of the draft rule, may be established by the subclaimant.

Agency Response: The Division disagrees that the rules create a barrier for subclaimants. In any dispute the injured employee is required to be given notice at that injured employee's last known address of record. If the injured employee has an objection to the timing of the hearing, the injured employee may request a

continuance. New §140.6 affords safeguards for the injured employee that did not exist by rule before; however, the Division does not believe that these safeguards constitute barriers to a subclaimant's pursuit of recovery.

Proposed §140.6(d)(1)

Comment: Commenters state the rule ignores the statutory requirement that the person who provided compensation must first file a request for reimbursement and have been denied by the workers' compensation insurance carrier before becoming a subclaimant. Commenter states that paying for or providing a benefit does not automatically confer subclaimant status under §409.009. Commenter recommends the following language: "(b)(1) A subclaimant may file and pursue a subclaim for reimbursement of compensation that has been provided to an injured employee only after first requesting reimbursement from and being denied that reimbursement by the appropriate workers' compensation insurance carrier, and is entitled to appropriate dispute resolution in accordance with the Texas Workers' Compensation Act (Act) and Division of Workers' Compensation (Division) rules."

Agency Response: The Division disagrees with commenters' interpretation of §140.6. Section 140.6 does not relieve a potential subclaimant from the requirements of §409.009 prior to pursuing dispute resolution.

Comment: Commenter states the rule should include the provision that "a subclaimant may not pursue the claim and participate in any dispute resolution process contrary to positions taken by the injured employee and is subject to the direction and control of the injured employee." Further, the commenter states that a subclaimant does not have a right to judicial review, since the statutory sections concerned do not provide for judicial review separate from other provisions in the Act providing for dispute resolution.

Commenter states that if there was ever a right for a subclaimant to pursue dispute resolution regarding issues of compensability, that right was abrogated by the legislature in 2007 with the adoption of §409.0091.

Commenter requests a 60 day automatic stay in favor of the injured employee. This stay would guarantee that injured employees who wish to participate in dispute resolution are not rushed and provide a disincentive for subclaimants to pursue a dispute at a pace that leaves an injured employee unprepared. The commenter recommends the following language be added to §140.6(d)(4)(A): "The Division shall continue a hearing once, if the Division receives a request for a continuance from the employee no later than five calendar days before the date of the scheduled contested case hearing. The Division shall reschedule the hearing to a date no sooner than sixty days (60) after the scheduled hearing date, unless the parties otherwise agree. The Division shall immediately notify the subclaimant and the carrier of a continuance that was granted or denied under this subsection." The commenter also recommends the following language be added to §140.6(d)(4)(B): "The exchange deadlines, set out in Chapter 142, shall be extended in cases stayed under §140.6(d)(4)(A). Any evidence obtained by the injured employee during the stay is admissible at the contested case hearing, without a showing of good cause, where the injured employee exchanges that evidence no later than 5 business days following taking possession of the evidence."

Agency Response: The Division disagrees that a subclaimant is subject to the position and control of an injured employee in every circumstance. However, §140.6 provides sufficient safeguards for the injured employee that did not exist previously by rule. Finally, the Division disagrees that the recommended language is necessary. In any dispute, the injured employee is required to be given notice at that injured employee's last known address of record. If the injured employee has an objection to the timing of the hearing, the injured employee may request a continuance.

Proposed §140.6(d)(2)

Comment: Commenters recommend the term "with reasonable diligence" as used in proposed §140.6(d)(2)(C) be either deleted or defined. Another commenter states that there is no "reasonable diligence" requirement in the statute and such a requirement cannot be created for the rule, absent statutory authority. The commenter asserts that such a requirement would impose impermissible burdens on a party. Commenter states that there is a difference between a subclaimant's dissatisfaction with the pace at which an injured employee is pursuing a claim, and an injured employee not pursuing the claim at all.

Commenter recommends that the phrases "not pursuing the dispute with reasonable diligence" and "unable to contact the employee through the exercise of reasonable diligence" should be defined. The commenter states this is needed to avoid disparity among hearing officers concerning what must be shown to establish reasonable diligence in both the pursuit of the claim and in efforts to contact the injured employee.

Commenters state a subclaimant should be required to have made "continuous and persistent efforts" to locate the injured employee. The commenters also state the subclaimant should be required to document and demonstrate the efforts made.

Agency Response: The Division disagrees that the terms need to be defined. Reasonable diligence is a term of art and must be determined on a case by case basis. It can only be determined by examining all of the facts and circumstances in an individual case, in some cases, including a review of whether the subclaimant's efforts were continuous, persistent, and reasonable.

Comment: The commenter expresses concern that this section places no obligation on the subclaimant to notify an injured employee prior to pursuing a claim for reimbursement, and recommends that prior to attempting to pursue a dispute with the Division, without the participation of the injured employee, the subclaimant should be required to certify that it contacted the injured employee "in writing, by verifiable means." Commenter recommends that the notice should advise the injured employee of the consequences of a dispute decision and that free assistance is available through the Office of the Injured Employee Counsel. The commenter also recommends that the notice should be at the beginning of the dispute resolution process or at a stage prior to the contested hearing to reduce the potential for unfair surprise and maximize opportunities for the injured employee to participate at the earliest stages of dispute resolution.

Agency Response: The Division agrees that notice to the injured employee is necessary and amends §140.6 to clarify: In any dispute the injured employee is required to be given notice at that injured employee's last known address of record, and if the injured employee has an objection to the timing of the hearing, the injured employee may request a continuance. New §140.6 affords safeguards for the injured employee that did not previously exist.

Comment: Commenters recommend that proposed §140.6(d)(2) be limited to health care insurers, other than a health care insurer as defined in §409.0091(a).

Agency Response: The Division disagrees with the suggested change. The comment suggests that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Comment: Commenter recommends the term "prior agreement" be defined to mean an agreement that is reached prior to the filing of a request for reimbursement by a health care insurer. The commenter states this would prevent abuses by workers' compensation insurance carriers who may solicit agreements from injured employees only as a tactic for preventing a health care insurer the ability to pursue a compensability dispute.

Commenter states that a claimant should not be unfairly surprised or prejudiced by a health care insurer subclaimant efforts in dispute resolution. The commenter recommends these concerns be addressed without infringing on a health care insurer's contractual right to reimbursement or subrogation by notice to the claimant and the free granting of continuances. The commenter also recommends that the rule include the following provision: "The subclaimant may establish that an injured worker is not pursuing the dispute with reasonable diligence by any means which a BRO or CCH officer, through their sole discretion accepts as probative of the intention of the injured worker to pursue or not pursue his or her rights to invoke the dispute process."

Agency Response: The Division disagrees the recommended changes are necessary. In any dispute, the injured employee is required to be given notice at that injured employee's last known address of record. The injured employee's agreement or testimony before a benefit review conference or contested case hearing that the injury is not compensable is evidence which the benefit review officer or hearing officer must consider and weigh when making a determination on a claim. However, reasonable diligence is a term of art and must be determined on a case by case basis. It can only be determined by examining all of the facts and circumstances in an individual case.

Proposed §140.6(d)(2)(C)

Comment: A commenter states this subsection implies that even in cases where injured employees may be participating, the subclaimant is permitted to press forward without the injured employee's permission. The commenter recommends adding §140.6(d)(2)(D) to read: "An injured employee is presumed to be pursuing a dispute with reasonable diligence, unless the subclaimant provides clear and convincing evidence to the contrary."

Agency Response: The Division disagrees with the suggested language. Reasonable diligence is a term of art and must be determined on a case by case basis. It can only be determined by examining all of the facts and circumstances in an individual case.

Proposed §140.6(d)(3)

Comment: Commenter states this new language is not contained in the statute and since it could be against the interests of the injured employee, the subclaimant should be absolutely certain that the injured employee is not intending to pursue the claim. The commenter recommends §140.6(d)(3)(A) be amended to read "it has contacted the injured employee and the injured employee states in writing that the injured employee will not pursue the dispute."

Agency Response: The Division disagrees with the suggested language. Reasonable diligence is a term of art and must be determined on a case by case basis. It can only be determined by examining all of the facts and circumstances in an individual case. The burden of proof in an administrative hearing under the Labor Code is preponderance of the evidence.

Comment: Commenter states the law does not provide that an injured employee must pursue a claim or recovery with "reasonable diligence." The Division is creating a new "reasonable diligence" standard not contained in the statute.

Commenter states that allowing a subclaimant to proceed in the absence of an injured employee does not take into account the various reasons that a subclaimant cannot locate an injured employee and allowing the subclaimant to proceed without the injured employee may result in irrevocable injury (financially) to an injured employee who may end up being liable for the payment of what may have been a compensable injury.

Agency Response: The Division disagrees with commenters assertions. In any dispute the injured employee is required to be given notice at that injured employee's last known address of record. If the injured employee has an objection to the timing of the hearing, the injured employee may request a continuance. New §140.6 affords safeguards for the injured employee that did not previously exist including reasonable diligence--intended as safeguard for the injured employee rights.

Proposed §140.6(d)(3)(A)

Comment: Commenter states that there are significant legal consequences for injured employees in workers' compensation disputes. Injured employees have a right to due process, right to notice, and right to be heard. Therefore, the commenter recommends that the contact requirement be strengthened to require that contact with the injured employee be in writing, by verifiable means or in writing, via certified mail, return receipt requested. Commenter further recommends that the written notice contain a conspicuous warning that the decision will be binding against the injured employee even if the injured employee does not participate in the hearing and text informing the injured employee that free assistance in the dispute resolution process is available to the injured employee through the Office of the Injured Employee Counsel.

Agency Response: The Division agrees that injured employees have the rights to due process, to notice, and to be heard. Although notices sent to injured employees are in writing and sent to the last known address on record for the employee, the Division agrees that a warning regarding a possible decision and contact information for the Office of Injured Employee Counsel is reasonable and the rule is amended accordingly.

Comment: Commenter expresses concern that the proposed rule appears to indicate an intention by the Division to abandon the 10-day letter requirement in the situation of a subclaimant action. The commenter states that it is essential that the Division, as the regulatory body, continue to send a warning letter

to injured employees, which states that if they do not participate in the hearing, the issue may be resolved against them and a decision will be binding against them even though they did not participate in the hearing.

Agency Response: The practice of sending a "10-day letter" to a party who fails to attend a contested case hearing is not mandated by statute or rule. It is a practice performed by Hearings Officers to insure due process. The Division has no intention of discontinuing the 10-day letter practice at this time. If the injured employee requires additional time for the hearing, the injured employee may request a continuance.

Proposed §140.6(e)(2)

Comment: Commenter recommends proposed §140.6(e)(2) be deleted. Commenter states §409.009 was not amended to provide a specific dispute resolution process for health care insurers. Commenters recommend that §140.6(e)(2) be limited to health care insurers, other than a health care insurer as defined in §409.0091(a). The commenters also recommend that if the subsection is not deleted, a phrase should be added in §140.6(e)(1) that the subclaimant should pursue medical dispute resolution in the same manner as an injured employee or as a health care provider as appropriate.

Agency Response: The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Proposed §140.7(a)

Comment: Several commenters recommended language changes to proposed §140.7(a) to read as follows:

"(a) Health Care Insurer. In this section, health care insurer means an insurance carrier and an authorized representative of an insurance carrier, as described in §402.084(c-1)."

The commenters state that this suggested definition slightly changes the definition used in the statute and recommends the statutory definition in order to avoid any unexpected impact.

Agency Response: The Division agrees with the general substance of the recommended change, which is consistent with the statutory definition, and has revised §140.7 accordingly.

Proposed §140.7(a) and (b)

Comment: A commenter recommends that subsection (b) be amended to indicate §140.7 gives the justification and statutory authority for "claims."

Agency Response: The Division disagrees that the change is necessary but has revised §140.7 as a result of other comments received.

Proposed §140.7(b)

Comment: Commenter recommends modifying this subsection to remove the language stating §140.7 applies to a health care insurer identified based on information received under §402.084(c-3), which is a Division data match. The commenter states that the subclaim may not "be based on" the information received under §402.084(c-1), and §409.0091 is not limited by the information, rather it is limited by the definition of a health care insurer in §409.0091.

Agency Response: Section 409.0091(n) states that "Except as provided by subsection (s), a health care insurer must file a request for reimbursement with the workers' compensation insurance carrier not later than six months after the date on which the health care insurer received information under §402.084(c-3)."

Section 409.0091(s) states, "On or after September 1, 2007, from information provided to a health care insurer before January 1, 2007, under §402.084(c-3), the health care insurer may file not later than March 1, 2008:

(1) a subclaim with the division under subsection (l) if a request for reimbursement has been presented and denied by a workers' compensation insurance carrier; or

(2) a request for reimbursement under subsection (f) if a request for reimbursement has not previously been presented and denied by the workers' compensation insurance carrier."

All of the filing deadlines in §409.0091 are tied to the date of a data match. Without a data match, there would be no basis upon which to establish a filing deadline. Therefore, §409.0091 only applies to cases where there is a data match under §402.084(c-3).

Comment: Commenters recommend that §140.7 should clearly indicate that it does not apply to network claims where the provider was not a part of the carrier's workers' compensation health care network. Commenter states a carrier in a network has no liability for medical treatment rendered outside of that network. Therefore, a provider or health care insurer would have no standing as a subclaimant. Commenter further states §409.0091 does not grant any right contrary to the network provisions and the Insurance Code specifically indicates that in the event of a conflict between the Insurance Code and the Labor Code, the Insurance Code controls.

Agency Response: The Division clarifies that adopted §§140.6 - 140.8 does not prevent a person from seeking reimbursement or dispute resolution for medical services paid by the person when the individual to whom the medical service was provided was subject to treatment through a workers' compensation health care network. However, adopted §§140.6 - 140.8 also do not attempt to supplant the provisions in Chapter 1305 of the Insurance Code. Insurance Code §1305.003(b) provides in part: "In the event of a conflict between Title 5, Labor Code, and this chapter as to... the resolution of disputes regarding medical benefits provided through those networks, this chapter prevails." This provision is also contained in Labor Code §408.031(b). Therefore, if a provision of the Labor Code Title 5 were to conflict with a provision of Insurance Code Chapter 1305, the Insurance Code Chapter 1305 would prevail. Based on this reasoning, the Division does not have statutory authority to adopt a rule under Labor Code Title 5 which is contrary to the Insurance Code Chapter 1305.

The Insurance Code §1305.006 provides: "An insurance carrier that establishes or contracts with a network is liable for the following out-of-network health care that is provided to an injured employee: (1) emergency care; (2) health care provided to an injured employee who does not live within the service area of any network established by the insurance carrier or with which the insurance carrier has a contract; and (3) health care provided

by an out-of-network provider pursuant to a referral from the injured employee's treating doctor that has been approved by the network pursuant to Section 1305.103." If a health care insurer believes it has a valid subclaim under the §409.0091, it may request reimbursement and pursue dispute resolution. However, if the injured employee for whom the care was provided is subject to certified network requirements, the workers' compensation insurance carrier may not be liable for the health care unless the health care was provided by an in-network provider selected or assigned pursuant to Insurance Code Chapter 1305 or unless the health care meets one of the three out-of-network exceptions listed in Insurance Code §1305.006.

Comment: Commenter states that §140.7 implies that there is only one type of health care insurer, whereas there are two types of health care insurers that may pursue reimbursement claims against the workers' compensation insurance carriers. There are health care insurers as defined by §402.084(c-1) and there are all other health care insurers (i.e., unlicensed health care insurers and licensed health care insurers without qualified Chapter 504 fraud programs). Commenter states that health care insurers as defined in §402.084(c-1) must seek rights and remedies under the provisions of §409.0091, and these health care insurers do not have the option of deciding whether to pursue reimbursement under §409.0091 *"based on information received under §402.084(c-3)"* or instead pursue reimbursement under §409.009 independent of their status as a §402.084(c-1) health care insurer. Commenter states this would conflict with proper statutory construction as mandated by Texas Government Code §311.026(b). Commenters recommend that §140.7(b) be rewritten as follows: "(b) This section applies to claims by a health care insurer as defined in §402.084(c-1)."

Agency Response: The Division has made the recommended change to §140.7(b). However, the Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Comment: Commenters assert that there is no statutory authority for §140.7 to apply only to subclaimants who have obtained data matches under the authority of §402.084(c-3). Commenter further states that health care insurers may identify potential subclaims outside of the matching process provided by §402.084(c-3); and, in accordance with §408.027(d), may request reimbursement for these claims. Another commenter states §409.0091 creates a process applicable to a health care insurer regardless of whether the claim is identified through a data match under §402.084 or some other method. The commenters recommend the deletion of §140.7(b) as proposed.

Agency Response: The Division disagrees. Section 409.0091(n) states that: "Except as provided by subsection (s), a health care insurer must file a request for reimbursement with the workers' compensation insurance carrier not later than six months after the date on which the health care insurer received information under §402.084(c-3)."

Section 409.0091(s) states, "On or after September 1, 2007, from information provided to a health care insurer before January 1, 2007, under §402.084(c-3), the health care insurer may file not later than March 1, 2008:

(1) a subclaim with the division under subsection (l) if a request for reimbursement has been presented and denied by a workers' compensation insurance carrier; or

(2) a request for reimbursement under subsection (f) if a request for reimbursement has not previously been presented and denied by the workers' compensation insurance carrier."

All of the filing deadlines in §409.0091 are tied to the date of a data match. Without a data match, there would be no basis upon which to establish a filing deadline. Therefore, the Division has determined that §409.0091 only applies to cases where there is a data match under §402.084(c-3).

Proposed §140.7(c)

Comment: Commenters state that §140.7 should be limited to health care insurers as defined in §409.0091(a). The commenters recommend the rule specify that health care insurers are not entitled to reimbursement on the basis of waiver. The commenters also recommend adding the following language: "Notwithstanding §409.009, §409.0091 sets forth the exclusive rights and remedies for health care insurers and their authorized representatives, as described by §402.084(c-1)."

Agency Response: The Division disagrees with the suggested change. The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. §409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Section 409.009 places no limitations or restrictions on arguments, defenses, or legal theories which a subclaimant may bring. Likewise, a subclaimant is subject to any defenses which the workers' compensation carrier may have against the injured employee. Section 409.0091 specifically limits defenses available to the workers' compensation insurance carrier, but does not limit arguments or legal theories available to the health care insurer.

Proposed §140.8

Comment: Commenter recommends that §140.8 be limited to health care insurers as defined in §409.0091(a). The procedures for health care insurer subclaimants are distinct by statute. Section 409.0091(a) health care insurers have different rights and remedies than §409.009 subclaimants that do not meet the §409.0091(a) definition. The commenter recommends amending the heading of §140.8 to read as follows: "§140.8 Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits Under §409.0091."

Agency Response: The Division agrees that §409.0091 provides distinct provisions available to certain health care insurers defined in §409.0091 and the rule is amended accordingly.

Comment: Commenter states that §140.8 attempts to address the process for dispute resolution at the Division but does not specify submission and processing procedures for a request for reimbursement under §409.0091(f) - (j). The commenter also

states that the rules do not provide guidance to workers' compensation insurance carriers on how to handle requests for reimbursement received from multiple authorized agents of a health care insurer; or, how to ensure the validity of the agent's authorization to collect this debt on behalf of the health care insurer or how to close out a claim if payment has been processed to one authorized agent, but an additional authorized agent seeks additional payments for the same claim.

Additionally, the commenter states that there is no direction to health care insurers about the appropriate way to authorize an agent to collect a debt which may be owed by a carrier; or, whether health care insurers may contract with more than one authorized agent and how such a situation will be handled. The commenter asserts §140.8(h)(2) as proposed recognizes that multiple authorized agents may cause confusion and sets forth a first-come right to dispute resolution for multiple authorized agents, yet the rule provides no guidance for the parties before the dispute process begins. The commenter also asserts that §409.0091(r) specifically grants rule making authority to both the Commissioner of Insurance and the Commissioner of the Division of Workers' Compensation "to clarify the processes required by, fulfill the purpose of, or assist the parties in the proper adjudication of subclaims under this subtitle" as this statute has implications on the business processes for both health care insurers and workers' compensation insurers.

Agency Response: The Division disagrees with commenter's assertions. The processes and procedures to be followed for the submission of a medical fee dispute and dispute resolution which are within the jurisdiction of the Division, are contained in §133.307 of this title (relating to MDR of Fee Disputes). Section 133.307 also contains the requirements for a workers' compensation insurance carrier to process and respond to a request for reimbursement. In accordance with Labor Code §413.031 the role of the Division is to adjudicate the payment given. However, the Labor Code does not provide authority for the Division to govern debt collection. The adopted rules are intended to primarily address the dispute resolution aspects for subclaimants and are placed in Chapter 140 of this title. Other processing aspects for subclaimants may be proposed, adopted, and placed in appropriate chapters of the rules as necessary to reduce disputes.

Comment: Commenter states proposed §140.8 does not provide an efficient system by which group health care providers and injured employees may be notified of and must process reimbursements of any owed copays, deductibles and coinsurance collected from an injured employee for a compensable injury. Commenter also states these provisions do not provide adequate guidance to these parties and may actually lead to increased disputes, although the rules do not provide for guidance on how one of these parties is to proceed in a dispute. Commenter supports that a health care provider would owe any copays, deductibles and coinsurance collected from an injured employee for health care provided by a health care insurance carrier for a compensable injury, the commenter has concerns over the timing of the notice to the health care provider and the injured employee of the possible need for reimbursement. Commenter further states that the issue is exacerbated by the fact that proposed §140.8 requires the health care provider to submit reimbursement for all copays, deductibles and coinsurance collected from an injured employee within 45 days of receipt of the notice that the claim is compensable. Commenter questions whether either of these notices would be considered receipt that the claim is compensable.

Commenter asserts proposed §140.8 does not provide guidance as to which party is responsible for documenting the amount paid by the injured employee. The commenter questions whether the injured employee or the health care provider is to provide the documentation; or, if this information is supposed to be in the Explanation of Benefits required by the workers' compensation insurance carrier under adopted §140.8(d)(1)(E) and if so, how is the workers' compensation insurance carrier supposed to discover that information? The commenter also questions what happens when there is conflicting documentation or just a straight refusal by the health care provider to reimburse?

Commenter states that there is no definitive notice that a claim has been determined to be compensable and monies are actually owed.

Commenter noted that a notice to the group health care provider and the injured employee is required twice in the Division's proposed rule. However, the commenter said they see no notice requirement after a dispute resolution at the Division of Workers' Compensation. Commenter states that neither of the required notices is a guarantee that money is owed to an injured employee, rather than may be owed.

Agency Response: The Division agrees in part and disagrees in part. When there is a medical fee dispute filed, all parties are required to be given notice. Parties include the health care provider, the health care insurer, the injured worker, and the workers' compensation insurer. A party wishing to participate in dispute resolution has the burden to establish that they are entitled to the relief they seek. This includes establishing that health care was provided and that it was provided for a compensable injury. The final result of dispute resolution is sent to all parties. Furthermore, subrogation of claims between insurance carriers is a remedy in equity which is a complex and challenging process within the civil legal system and is equally complex and challenging in the Division's informal administrative system. However, the Division is committed to adjudicating disputes between insurance carriers in the same manner as disputes between injured employees, employers, health care providers, and workers' compensation insurance carriers.

Comment: Commenter states that the proposed rule fails to require the subclaimant to provide evidence of the date of the injury or that the data match was conducted before January 1, 2007, and that it was filed with the Division before March 1, 2008.

Commenter states that the proposed rule should be clarified to ensure that any claim prior to the effective date of the bill which was not filed by the March 1, 2008 deadline must utilize the §409.009 process and has no opportunity to utilize the §409.0091 process. Commenter states that by combining the dispute processes for both statutory sections into one the adopted rule makes it impossible to ensure compliance with the statute.

Commenter states that under §408.027(d) a subclaimant seeking reimbursement for health care related to a compensable injury must choose to seek reimbursement under either §409.009 or §409.0091, but not both. Commenter states this is further evidenced by the last two words in §408.027(d)--"may recover reimbursement...§409.009 or §409.0091, as applicable." Per the commenter, this section alone highlights that the statutory construction intends two separate and mutually exclusive dispute processes rather than the combined dispute process adopted in the Division's rule.

Agency Response: The Division disagrees. The Division believes that the plain language of the statute does not need to be repeated in the rule. The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Section 409.009 places no limitations or restrictions on arguments, defenses, or legal theories which a subclaimant may bring. Likewise, a subclaimant is subject to any defenses which the workers' compensation insurance carrier may have against the injured employee. Section 409.0091 specifically limits defenses available to the workers' compensation insurance carrier, but does not limit arguments or legal theories available to the health care insurer.

Comment: Commenter states that there should be a good faith standard on the part of the health care insurer before it submits a bill, and that the health care insurer at least have a good faith belief that this is a compensable claim or part of a compensable claim.

Agency Response: The Division disagrees with this comment and declines to make a change. It is true that a party requesting reimbursement under the Labor Code should act in good faith; however, the Division does not believe that it has authority to set out a specific standard of good faith within this rule.

Furthermore, good faith is already sufficiently addressed by Labor Code §415.008, relating to Fraudulently Obtaining or Denying Benefits; Administrative Violation, and Labor Code §415.009, relating to Frivolous Actions; Administrative Violation.

Comment: Commenter states that the adopted rule should clarify that appeals of medical necessity and medical fee disputes are subject to the recently adopted §133.307 and §133.308.

Agency Response: The Division clarifies that appeals of medical necessity and medical fee disputes are subject to the current version of §133.307 and §133.308, with any modifications addressed in §140.8.

Comment: Commenter recommends a new section be added to deter an opposing party from forcing each reimbursement request to a dispute resolution process and delay payment of a compensable medical benefit paid by a health care insurer. This concept is also consistent with the concept of a prevailing party having its expenses reimbursed. The commenter recommends the following:

"(i) Not withstanding the provisions of §133.307 and §133.308, any dispute resolution fees paid by a health insurer to bring a subclaim to resolution shall be reimbursed to the subclaimant by the carrier if the subclaim prevails, in whole or in part, in the dispute resolution outcome."

Agency Response: The Division disagrees with the comment and declines to make the requested change, because the requested change would violate §409.0091(l).

Section 409.0091(l) provides in part, "Rules modified or adopted under this section should ensure that the workers' compensation insurance carrier is not penalized, including not being held responsible for costs of obtaining the additional information, if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request." Section 409.0091(l) does not make a distinction regarding the outcome of dispute resolution, therefore a rule provision contrary to §409.0091(l) would be invalid, even if it only applied in situations where a subclaimant ultimately prevails in dispute resolution.

Proposed §140.8(a)

Comment: Commenter recommends that the definition of the term "health care insurer" in §140.8(a) be conformed to the definition found in §409.0091(a). The commenter asserts that the Division and the Commissioner of Workers' Compensation do not have the authority to amend or modify a definition set forth by a statutory provision.

Agency Response: The Division agrees. Section 140.8(a) has been revised accordingly.

Proposed §140.8(b)

Comment: Commenter states that the proposed rule omits a limitation found in §409.0091(n) on the health care insurer's ability to file reimbursement requests, in that health care insurers must file for reimbursement no later than six months after the date the health care insurer received information and not later than 18 months after the health care insurer paid for the health care service. Further, this limitation only applies to subclaims based on established compensable claims occurring on or after September 1, 2007.

Agency Response: The Division disagrees with the proposed change. These valid limitations in §409.0091(n) do not need to be repeated in this rule.

Comment: Commenter asserts that the early notices before a final adjudication of the recovery of payments in §140.8(b)(2) and possibly §140.8(d)(1)(E) as proposed, could lead to confusion and ill-will between the injured employee and their primary treating doctor or other provider in group health, who are likely to be ignorant of workers' compensation regulations.

Agency Response: The Division disagrees. The Division believes that timely notices increase understanding and good will.

Comment: The commenter states that the exception under §409.0091(s) is only available for certain health care insurers that received information on those potential subclaims from the Division under §402.084(c)(3) of the Labor Code before January 1, 2007 and those requests had to be filed by March 1, 2008. The commenter also states that the health care insurer's limitation of not later than six months after the date on which the health care insurer received information under §402.084(c-3) and not later than 18 months after the health care insurer paid for the health care service applies to potential subclaims on all established compensable claims occurring on or after September 1, 2007.

Agency Response: If the authorized representative meets the definition of subclaimant under §409.009, they necessarily have all rights which a §409.009 subclaimant has, which includes pursuing a claim for compensability. If they do not meet the definition of a §409.009 subclaimant, the authorized representative is limited to pursuing only that which is allowed under §409.0091.

The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive rem-

edy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Proposed §140.8(b)(1)

Comment: Commenter recommends the following language for §140.8(b)(1):

"(b)(1) Form. The request must be on the form and in the format and manner prescribed by the Division of Workers' Compensation (Division) and must contain all the required elements on the form. A request is not complete or deemed to be filed with the workers' compensation insurance carrier until all statutorily required information, including the date the information was provided, is received by the workers' compensation insurance carrier."

Commenter states that statutorily required information is often, but not always, somewhere in the attachments to the form. This requires the workers' compensation insurance carrier to manually wade through the attachments, which can be voluminous, to pull out the required information. This makes these requests much harder to review and process. Additionally, the date of match is a required element to determine timeliness.

Agency Response: The Division disagrees. Section 409.0091(f) requires submission of specific information in an health care insurer's request for reimbursement; however, §409.0091(f), does not specify that time frames are to be stayed if all the information is not submitted, and §409.0091(i) and (j) permit a workers' compensation insurance carrier to request additional information, establishing an additional amount of time for such a request. The Division believes that introducing a delay based on arguments concerning the "completeness" of a request for reimbursement would unnecessarily delay the reimbursement process, considering that the rule contains provisions allowing a workers' compensation insurance carrier to request additional information. The Division declines to make the suggested language changes.

Comment: Commenters recommend that the adopted rule clarify that health care insurers must submit a completed form DWC-26 with all required information and that merely putting "see attached" on the form and then submitting pages of screen prints is not acceptable. Commenters also recommend adding the word "complete" before "reimbursement request" in §140.8(b), (c), and (d). Commenter states that this will ensure that the timelines only begin when the request is complete.

Agency Response: The Division agrees in part, but also disagrees in part and declines to make a change. The Division clarifies that a health care insurer seeking reimbursement must submit a form DWC-26, as adopted §140.8(b)(1) requires a request to be in the form/format and manner prescribed by the Division and requires the request to contain all the required elements listed on the form. However, the Division declines to insert the word "complete" before the words "reimbursement request" in §140.8(b), (c), and (d), because the Division does not want to create additional disputes based on arguments that a request is not "complete" which would unnecessarily delay the reimbursement determination process. For this same reason, the Division declines to create a definition for "complete reimbursement request." If a workers' compensation insurance carrier believes it has not obtained all the information necessary to make a determination, it should request additional information as permitted by the statute.

Proposed §140.8(b)(1), (f)(1), (f)(5), and (g)(1) - (3)

Comment: Commenter states that adopted §140.8 imposes new requirements that did not exist at the time that many requests for reimbursement and or subclaims were filed. The commenter states that adopted §140.8 needs to make some accommodation for these requests for reimbursement and subclaims that are already "in the pipeline." The commenter states that many requests for reimbursement were presented prior to the adoption of DWC-26 by the Division, to require elements of a form not then in existence. The commenter states that it is not appropriate to impose a requirement retrospectively that did not exist at the time of the original request for reimbursement. The commenter recommends that the DWC-26 form requirement should apply only to §409.009 requests for reimbursement made after the effective date of the rule.

Commenter states that health care insurers have been filing requests for reimbursement under §409.009 absent any deadline for filing a notice of subclaimant status. To impose a deadline on these requests for reimbursement could prevent a health care insurer from filing a subclaim if 120 days have already expired from the date the carrier fails to respond to a request for reimbursement or reduces or denies the requested reimbursement amount. Commenter also states that no deadline for filing a subclaim exists in statute or rule for §409.009 and this provision should not apply to requests for reimbursement that were made prior to the effective date of the rule.

Commenter recommends that the following subsections should not apply to notices of subclaimant status that have already been filed with the Division: §140.8(f)(5) and (g)(1) - (3).

Agency Response: The Division disagrees with the comment. The statute did not "grandfather" claims already in process. An administrative agency may make changes applicable to future steps in pending cases. No one has a vested right in a procedural remedy. *Texas Dept. of Health v. Long,* 659 S.W. 2d 158. These are procedural rules. The rules will apply to all procedures and processes occurring on or after the effective date of these rules. They will not apply to procedures and processes that have occurred prior to the effective date of these rules.

Proposed §140.8(c)

Comment: Commenter questions whether a carrier that cannot request information that is not in the files of the health insurer or in the process of being incorporated into the file will be allowed to deny a claim because the carrier needs that information. The commenter states that this limitation in the rule is not found in the statute.

Agency Response: The Division notes that provision referenced by the commenter has been removed in response to another comment; as such the commenter's concerns have been addressed.

Comment: Commenter states that timely filing is a threshold question in evaluating a claim. It depends on when the health care insurer under §409.0091 received the claim information, when they actually paid the bill, and when they received the data match information. The commenter asks, if the information isn't

provided, can it be requested, or is it outside the scope of allowable information to be requested?

Agency Response: The Division agrees that the date of the data match is a threshold requirement for reimbursement eligibility. As such, health care insurers seeking reimbursement should provide the workers' compensation insurance carriers with information detailing the date of the data match.

Proposed §140.8(c)(1)

Comment: Commenter states that §140.8(c)(1) is silent on the effect of a failure to respond to a subclaim. The commenter recommends that §140.8 include a provision that failure of the insurance carrier to respond will result in the workers' compensation insurance carrier in effect waiving its right to dispute the request and that the Division will order immediate payment of the request for reimbursement.

Agency Response: The Division agrees with the comment, but declines to make the requested change, because the requested change would violate §409.0091(q). Section 409.0091(q) does not authorize the waiver of a carrier's right to dispute a request upon failing to respond to a subclaim request. Furthermore, §409.0091(q) provides: "An action or failure to act by a workers' compensation insurance carrier under this section may not serve as the basis for an examination or administrative action by the department or the division, or for any cause of action by any person, except for judicial review under this subtitle." If the Division were to order immediate payment of the request for reimbursement because a workers compensation insurance carrier failed to respond to a request for reimbursement, it would constitute an administrative action in violation of §409.0091(q).

Proposed §140.8(c)(1) - (3)

Comment: Commenter recommends that proposed §140.8(c)(2) be amended to add this sentence ""Additional information" does not include any of the statutorily required information discussed in subsection (b)." Commenter states this is necessary because a stakeholder believes that the request to provide the required elements in §409.0091 is "additional information." The commenter states the clear language of the statute is that "additional information" is that information needed beyond the elements outlined in the statute.

Agency Response: The Division disagrees with the comment and declines to make the change requested. The statute does not contain language stating that "additional information" is solely information needed beyond the elements outlined in the statute, and the Division does not believe that creating such a provision would aid in the resolution of claims. Instances might occur when a workers' compensation insurance carrier needs to request additional information, even if such information had previously been provided pursuant to the statute, such as if the information could not be read or was accidentally left incomplete. Preventing the workers' compensation insurance carrier from requesting the information as part of the initial request and response period would only increase the likelihood of such a claim leading to a dispute resolution.

Comment: Some commenters recommend deletion of the sentence limiting the request for information to that which is in or in process of being incorporated into the health insurer's files. Commenter states this limitation is not found in the statute and is an impermissible limitation on the workers' compensation insurance carrier's right and responsibility to get all information necessary to properly audit and pay the claim. Another commenter states that this limitation is outside the rule making authority of the Division. Commenter states that this provision would artificially and unnecessarily restrict the information a workers' compensation insurance carrier may request in considering a heath care insurer's claim to reimbursement. Commenter states that this provision regarding medical documentation is often not in the health insurers files or even asked for, although the health insurer can get that information from the provider with whom it has a contract. The commenters state that workers' compensation insurance carriers have no way of knowing what documents and information is contained in or in the process of being incorporated into the employee's medical billing record maintained by the health care insurer. A commenter states that an insurer, to properly review a reimbursement request by a health care insurer must be in a position to review the entire relevant medical record and medical reports.

Commenter states that an example of information that the workers' compensation insurance carrier may need from the §402.084(c-1) health care insurer that would be outside of this limitation would include the documentation of when the health care insurer received the §402.084(c-3) information from the Division. The commenters state that this information is critical to determine if there is a timely request for reimbursement and timely filing of the subclaim. Additionally, the workers' compensation insurance carrier may need medical reports in order to determine whether or not the treatment arose out of the compensable injury; and, that this limitation creates compliance issues for the workers' compensation insurance carrier.

Commenter states that there is no process under the rule for workers' compensation insurance carriers to obtain those documents and information when they are not provided per request under the above rule language. The commenter recommends an additional sentence to §140.8(c)(2) that requires health care insurers to provide the same medical documentation that a health care provider is required to submit for reimbursement. The commenters recommend the following language be added: "The health care insurer and its authorized agent shall produce all relevant requested information that is in their possession, custody, control or to which they have access as may be necessary to substantiate the claim."

Commenter states this limitation directly conflicts with proposed §140.8(g)(3)(C) which requires the subclaimant to file "sufficient information to substantiate the claim" with the request for medical dispute resolution. It stands to reason that the subclaimant should be required to produce "sufficient information to substantiate the claim" to the workers' compensation insurance carrier as part of the reimbursement request so that the workers' compensation carrier does not have to wait for the dispute resolution process in order to get this information.

Commenter states that proposed §140.8(c)(2) already contains the restriction that the workers' compensation insurer may seek only information that is "relevant and necessary for the resolution of the dispute." The commenter states that this restriction is necessary and appropriate, but not the restriction that limits the information that can be obtained. The commenter states that it is difficult to understand why the Division is proposing to prohibit the workers' compensation insurer from obtaining information that is admittedly "relevant and necessary for the resolution of the dispute" merely because it is not in the health care insurer's billing record.

Agency Response: The Division generally agrees with this comment, declines to add the suggested sentence, but agrees to

delete the proposed sentence that reads: "A request for medical information must be for information that is contained in or in the process of being incorporated into the employee's medical billing record maintained by the health care insurer."

Comment: Commenter recommends deletion of language in §140.8(c)(2) that limits the kind of penalty a workers' compensation carrier should not be subjected to in order to obtain necessary information. The commenter states this limitation narrows the statute, which contains no limitation on what penalties the workers' compensation insurance carrier should not be subjected to.

Commenter states that it is not clear whether the insurance carrier can deny the claim due to a lack of information if the insurance carrier does not request the information.

Agency Response: The Division disagrees with the comment and declines to make the suggested change. The sentence referenced by the commenter is necessary to implement §409.0091(l). Section 409.0091(l) provides in part: "Rules modified or adopted under this section should ensure that the workers' compensation insurance carrier is not penalized, including not being held responsible for costs of obtaining the additional information, if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request." In addition, §409.0091(j) does not authorize the waiver of a workers' compensation insurance carrier's right to deny a health care insurer reimbursement request submitted with insufficient information to substantiate the request.

Proposed §140.8(c)(2)

Comment: Commenter references proposed §140.8(c)(2), and asserts that workers' compensation insurance carriers have no way of knowing what documents and information are contained in or in the process of being incorporated into the employee's medical billing record maintained by the health care insurer. The commenter says that there is no process under the rule for workers' compensation insurance carriers to obtain those documents and information when they are not provided per request under the above rule language.

Commenter says that proposed rules place no penalties, presumptions or burdens on health care insurers for failure to include all information in their requests for reimbursement necessary to comply with the provisions of §409.0091, and none for a group health care insurer's failure to comply with workers' compensation insurance carrier requests for additional information, but that instead the proposed rule places any burden resulting from a health care insurer's failure to comply on the workers' compensation insurance carrier. The commenter notes that the 90 and 120 day deadlines under §409.0091 and the proposed rule begins to run as soon as a request for reimbursement is received, regardless of whether or not a health care insurer has complied with §409.0091(f) or a carrier's information request, that the rule appears to have no penalties or incentives for a failure to use the form required in §140.8(b), and that it appears that carriers must simply request additional information when the form is not used.

Agency Response: The Division disagrees with the comment, and declines to make a change. The Division notes that the language in §140.8(c)(2) placing a limitation on what may be requested has been removed in the adopted text. As such, the commenters' concerns in relation to that language are resolved. The Division notes that adopted §140.8(b)(1) provides that "The request must be in the form/format and manner prescribed by the Division of Workers' Compensation (Division) and must contain all the required elements listed on the form." Upon receipt of a request for reimbursement, if a workers' compensation insurance carrier believes that this rule has been violated it can file a complaint with the Division pursuant to §180.2 (relating to Referrals).

It is correct that the time frames in §140.8 begin upon receipt of a request for reimbursement--this is necessary for accord with the time frames established by §409.0091(i) and (j). If a workers' compensation insurance carrier does not receive sufficient information to process a request when the request is first received, the workers' compensation carrier should request additional information as permitted by §409.0091(j).

Comment: Some commenters recommend that proposed §140.8(c)(2) be amended to include language that conforms to the statute, to provide that a workers' compensation insurance carrier should not be "penalized, including not being held responsible for the costs of obtaining the additional information, if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request."

Agency Response: The Division declines to make a change in response to this comment, as it is already addressed in adopted §140.8(d)(2).

Comment: Some commenters recommend deleting the word "agent" from proposed §140.8(c)(2) and replacing it with "authorized representative," since "agent" can have multiple meanings and the authority differs.

Agency Response: The division agrees with this comment and has changed the terms accordingly.

Comment: Commenter recommends changing the words "[S]ubstantiate the claim" to "establish the workers' compensation insurance carrier's liability for the claim."

Commenters recommend that, following the requirement that the health care insurer has the obligation to provide its agents with information necessary for the resolution of the reimbursement request, an additional requirement be added that provides for the agent to furnish this information to the workers' compensation insurance carrier.

Agency Response: The Division disagrees with the comment and recommendations. A claim involves other issues than liability. The rules already allow a workers' compensation insurance carrier to request information necessary to adjust a claim.

Comment: Commenter recommends adding the following language to §140.8(c)(2) to read as follows: "It is the health care insurer's obligation to furnish its agents with any information within its possession that is necessary for the resolution of a reimbursement request"

Commenter states that the health care insurer and its agents have no problem providing additional information to a workers' compensation insurance carrier if that information is within the possession of either entity. The commenter also states that this was a good faith agreement between the parties in the legislative negotiations to cooperate when additional information was needed by the workers' compensation insurance carrier and provide that additional information within 30 days if possible. The commenter states, however, there was always an issue related

to materials in possession of third parties that neither the workers' compensation carrier nor the health care insurer could compel production. The commenter states that it was recognized that certain information, such as medical records, were not in the possession of either the health care insurer or its agents, and the workers' compensation insurance carrier may need that information, the solution was to allow the parties to enter dispute resolution to enable either the agency or an independent review organization to request information in the possession of third parties or that could not be obtained by other means.

Agency Response: The Division agrees with the comment in part and agrees to change the wording as follows: "It is the health care insurer's obligation to furnish its authorized representatives with any information within its possession or control that is necessary for the resolution of a reimbursement request." Also, hearing officers have been delegated authority to approve subpoena requests to enable parties to properly prepare and possibly reach an agreement before requesting dispute resolution.

Proposed §140.8(d)(1)(A)

Comment: Commenters recommend the following language for §140.8(d)(1)(A): "For each medical benefit paid that is determined to be a correct payment and not subject to an appropriate defense, the workers' compensation insurance carrier shall pay the health care insurer the lesser of..."

Commenters state that this adds the qualifying language that is in the statute giving the workers' compensation insurance carrier certain defenses including determining whether it is a "medical benefit" and "a correct payment" and does not have a defense allowed under the workers' compensation law and §409.0091.

Agency Response: The Division disagrees with the comment and the suggested added language. The suggested language is unnecessary and may be interpreted to remove other reasons for which a carrier might elect to pay a claim.

Comment: Commenters state that proposed §140.8(d)(1)(A) implies that the workers' compensation insurance carrier must pay the applicable fee amount, regardless of other defenses. The commenters state that under §409.0091(h) the workers' compensation insurance carrier would be within its rights to apply a defense to some of the payment, or determine that some of the payments were not medical benefits, or were not "correct payments." The commenters recommend the rule be clarified to provide that after the workers' compensation insurance carrier determines that the heath care paid was for a medical benefit and was a correct payment, and that no other defenses apply, then the workers' compensation insurance carrier "shall" pay the health care insurer the lesser of the amount payable under the applicable fee guideline as of the date of service or the actual amount paid by the health care insurer.

Agency Response: The Division disagrees. The suggested language is unnecessary. Section 140.8(d)(2) accommodates the rights of the carrier to deny or reduce payment. Subsection (d)(1) does not imply that the "carrier must pay the applicable fee amount, regardless of other defenses" when read in conjunction with the totality of §140.8(d)(1).

Proposed §140.8(d)(1)(E)

Comment: Commenters recommend deleting proposed §140.8(d)(1)(E). The commenter states that this provision is unnecessary because subsection (d)(3) requires the workers' compensation insurance carrier to provide an explanation of benefits and Section 11 of House Bill 724 specifically provides that subclaims under §409.0091 must be on a compensable claim and not on a claim that has been denied based on compensability. Commenters state that there is no statutory authority in §409.0091(i) or (j) to allow the Division to impose this duty on the workers' compensation carrier. In addition, this requirement potentially requires the workers' compensation insurance carrier to waive an unresolved compensability dispute or a compensability dispute that has already been resolved in favor of the carrier.

Commenter states that the workers' compensation carrier response to a §409.0091 request for reimbursement may be to deny reimbursement based on a compensability issue. In such a situation, it would be clearly outside the authority of the Division to require the workers' compensation insurance carrier to send a notice to the health care provider and employee that includes "*an* explanation that the claim is compensable."

If this provision remains in the adopted rule, then commenter recommends the rule be clarified to provide that a workers' compensation insurance carrier provide the injured employee and health care provider with an explanation whether the claim is compensable and, if not, the basis for the workers' compensation insurance carrier's determination that the claim is not compensable. Such a provision should further state that the workers' compensation insurance carrier is relieved of their regulatory duty to provide the injured employee with a plain language notice of the workers' compensation insurance carrier's decision to not accept the claim as being compensable.

Agency Response: The Division disagrees with the comment. However, adopted §140.8(e)(1)(E) is amended to clarify that "If the claim is compensable" then "the notice shall include an explanation that the claim is compensable and that the health care provider must reimburse the injured employee for any amounts paid to the health care provider by the injured employee." The Division also clarifies that this notice may be included in the explanation of benefits required by adopted subsection (e)(2). In addition, the adopted rule is designed to accomplish the statutory requirements on the Commissioner of Workers' Compensation and the Commissioner of Insurance to implement rules consistent with the specified mandates in §409.0091(l), (o), and (r).

Comment: Those commenting state that it should not be the responsibility of the workers' compensation insurance carrier to notify the employee and health care provider. Commenter states this obligation is invoked when the workers' compensation insurance carrier pays the claim. Commenter further states that if the provider and the claimant had initially done what was necessary, then the workers' compensation insurance carrier would not be required to issue such a notice. The commenters recommend this notice obligation fall to the health insurance carrier.

Agency Response: The Division disagrees. The notice requirement in §140.8(d)(1)(E) requires the carrier to give its response to the reimbursement request to the injured employee and health care provider. In the same notice, it requires an explanation that, if the claim is compensable, the health care provider must reimburse the injured employee for any amounts paid to the health care provider by the injured employee. It is appropriate that the carrier explain its own position on the reimbursement request. It is economical and efficient to include the notice on reimbursement in the same communication.

Proposed §140.8(d)(1)(E) and (e)

Comment: Commenter states that reimbursement of medical payments made by the injured employee ought to be made by

the workers' compensation insurance carrier rather than the health care provider. The commenter states that there is no meaningful process for dispute resolution when the health care provider and injured employee do not agree on the amount of money paid by the injured employee for health care. The commenter recommends the language in §140.8(d)(1)(E) be amended to require the workers' compensation insurance carrier to reimburse the injured employee for any amounts paid to the health care provider by the employee.

Commenter recommends the language in §140.8(e) be amended to require the workers' compensation insurance carrier to reimburse the injured employee any payments made by the injured employee to the health care provider, including but not limited to, copays and deductibles.

Agency Response: The Division disagrees. A health care provider directly received the additional funds from the injured employee and is in the best position to determine the amount of refund that is due to the injured employee.

Proposed §140.8(d)(1)(E) and (g)(3)(C)

Comment: Commenter recommends that the form DWC-026 be revised to require the mailing address of the provider be included. This creates problems for the carrier as to where to send a copy of the carrier's response under §140.8(d)(1)(E) and where to send the explanation of benefits as required under §140.8(g)(3)(C) or where the carrier may request documents from the provider.

Commenter recommends that the form DWC-026 be revised to include the dates under §409.0091(n) or (s), as applicable. The commenter states that carriers are forced with every reimbursement request to ask for these dates as "additional information" in order to determine compliance with §409.0091(n) time limits, made applicable through §409.0091(f). The commenter states that the Division has made no mention of how, or if, it intends to enforce the §409.0091(n) deadlines.

Agency Response: The Division duly notes the recommendations. However, the recommendations do not constitute comment on the proposed rules, but rather comment regarding a Division form. The Division will apply the deadlines, if the issue is raised, in dispute resolution.

Proposed §140.8(d)(1)(F)

Comment: Commenters recommend the last sentence of adopted §140.8(d)(1)(F) be amended as follows: "The workers' compensation insurance carrier is liable for payment in accordance with Division fee guidelines and §409.0091(g) and (h)."

Commenters state that this language change is necessary to clarify that there are some statutory deductions and to ensure that the workers' compensation insurance carrier never pays more than it would have paid had the bill been properly submitted to the workers' compensation carrier. The commenters state the term "full payment" could be interpreted to require the workers' compensation insurance carrier to pay the full amount under workers' compensation even though the provider did receive some compensation from the group health insurer and the workers' compensation insurance carrier has already paid the group health insurer.

Agency Response: The Division disagrees. The totality of §140.8(d)(1) accommodates the concerns of the comment. The referenced sentence adequately incorporates the payment guidance in the Rule, which covers the statutory deductions. Please see §140.8(d)(1)(A) and (D).

Comment: Those commenting state that the rule creates additional liabilities not contemplated by the statute and adoption of this rule as proposed would be ultra vires. The commenters state that §409.0091(b) only applies to health care insurers and does not apply to health care providers. The amount of all payments that are due to the health care providers are the amount of those payments that are paid to the health care insurers under §409.0091 as evidenced by §409.0091(g). Otherwise subsection (g) would provide for an offset on the part of the workers' compensation insurance carrier per the fee guidelines.

Agency Response: The Division agrees that §409.0091(b) states that the section applies "only to a request for reimbursement by a health care insurer." However, the statutory section is not limited to application to health care insurers. There are multiple facets to reimbursement requests from health care insurers, and the Division is tasked with providing rules to implement the entire statutory section while continuing to enforce other provisions of the Labor Code. Labor Code §408.027 provides for reimbursement of health care providers and §413.011 provides for Division medical fee reimbursement guidelines. Workers' compensation insurance carriers are liable for the reimbursement of health care provided to injured employees and this reimbursement is based on the Division's medical fee reimbursement guidelines. Section 409.0091(g) states that: "The workers' compensation insurance carrier shall reduce the amount of the reimbursable subclaim by any payments the workers' compensation insurance carrier previously made to the same health care provider..." This provision of §409.0091 does not conflict with the requirement of adopted §140.8(e)(1)(E) because subsection (e)(1)(E) pertains to the health care provider ultimately receiving the fee guideline reimbursement amount established by a Division medical fee reimbursement guideline for the services that health care provider provided to the injured employee. In addition, §409.0091(o) requires that Division rules be amended or adopted to provide for reimbursement to the injured employee who has paid for health care services.

Comment: Commenter states that the health care provider has created the problem if it incorrectly files with the health care insurer for payment for medical services rendered; therefore, the health care provider should be the deemed to have made its election of a remedy by the way it sought payment for services and should not be entitled to additional reimbursement since the health care provider did not have to pay back the money it incorrectly received.

Agency Response: The Division disagrees with this comment and declines to make a change. The fact that the wrong carrier was billed does not necessarily mean that the health care provider made an "election of remedy" with its initial care and payment. The commissioners have the obligation under the statute to "adopt additional rules to clarify the processes required by, fulfill the purpose of, or assist the parties in the proper adjudication of subclaims" under §409.0091.

Proposed §140.8(d)(2)

Comment: Commenters recommend deleting §140.8(d)(2). Commenter states that §140.8(d)(2) is vague and does not add anything to the requirement in §140.8(d)(3) that the workers' compensation insurance carrier provide an explanation of benefits.

Commenter recommends that if §140.8(d)(2) is not deleted, then a clear definition of what is considered "a sufficient explanation" should be added, including a statement that standard denial codes in workers' comp are sufficient explanation of denial and will protect the workers' compensation insurance carrier from other payments sought by the health care insurer. Commenter recommends that the Division include a provision that failure to provide a sufficient explanation does not entitle the health care insurer to any payment other than the correct payment provided for by the Labor Code and applicable Division rules.

Agency Response: The Division does not agree with the recommended alternative language. Adopted §140.8(e) has been revised to clarify that the explanation of benefits shall provide sufficient explanation of the denial of the reimbursement request. Regarding failure to provide a sufficient explanation, there are no circumstances under which a health care insurer could be entitled to anything other than correct payment under the Labor Code and Division rules.

Comment: Commenter recommends amending proposed §140.8(d)(2) by adding this sentence: "If the denial is due to the fact that compensability has not been determined, agreed, or settled in a pre-existing contested case, the workers' compensation insurance carrier shall deny the request as pending determination of compensability and allow the health care insurer to file an abated subclaim under subsection (f)(6)."

Commenter states that in order to maintain efficiency in the workers' compensation system, it is not good public policy to require additional parties seeking reimbursement or subclaimant status to pursue a contested case to determine compensability when a pre-existing contested case is pending. Public policy dictates an abatement of the subclaimant's dispute resolution rights pending resolution of the existing contested case

Agency Response: The Division cannot agree with the comment or the recommended addition. The statutory language obviously contemplates the ability of a subclaimant to independently raise its remedies and proceed; therefore, the Division does not have the authority to create the recommended "abatement" of the subclaim. The injured employee is required to be noticed of the action and therefore has the ability to intervene, if appropriate or seek other action deemed necessary.

Proposed §140.8(d)(3)

Comment: Commenter recommends a defined time within which the workers' compensation carrier must provide the concerned parties the Explanation of Benefits be included.

Agency Response: The Division disagrees. Time limits are set for a workers' compensation insurance carrier to respond to a health care insurer's request for reimbursement. The workers' compensation carrier's response must include an explanation of benefits as required by §140.8(d)(1)(E), (2) and (3). Therefore, the time limit for providing an explanation of benefits is the same as the time limit for the response to the request for reimbursement.

Comment: Commenter states that any notice requirement should be the responsibility of the health care insurer who initiated the subclaim process, rather than the responsibility of the workers' compensation insurance carrier. Commenter states that there is no statutory requirement in §409.0091 for the workers' compensation insurance carrier to provide an Explanation of Benefits to the employee and to all health care providers merely because a health care insurer has filed a request for subclaim reimbursement.

Agency Response: The Division disagrees. The notice requirement in §140.8(d)(1)(E) and (3) require the carrier to give a response to the reimbursement request to the injured employee and health care provider. The same notice requires an explanation that, if the claim is compensable, the health care provider must reimburse the injured employee for any amounts paid to the health care provider by the injured employee. It is appropriate that the carrier explain its own position on the reimbursement request. It is economical and efficient to include the notice on reimbursement in the same communication.

Proposed §140.8(e)

Comment: Commenter recommends that the rule provide that the Division should place a copy of the subclaimant's notice in the workers' compensation insurer's box at Division's Central office within two days of receipt.

Agency Response: The Division disagrees. Prior to filing for Notice of Subclaimant Status, the party must file a request for reimbursement with the workers' compensation insurer and have that request denied. Filing a Notice of Subclaimant Status merely allows the subclaimant to be notified of any further proceedings on the claim. The workers' compensation insurer is already aware of the existence and claim of the subclaimant, based on the Request for Reimbursement.

Comment: Commenter stated that §140.8(e) does not provide any direction as to how a dispute over health care provider reimbursement to the injured employee would be handled.

Agency Response: The Division disagrees. Such a dispute would be handled under §133.307 of this title.

Proposed §140.8(e)(2)

Comment: Commenters state §140.8(e)(2) permits subclaimants to file their notice of subclaimant status with any field office location or the Division's central office. Commenters recommend that subclaimants file their notice of subclaimant status only with the Division's central office. This requirement would greatly reduce the chance of the requests being misplaced by field office personnel and generally speed up processing time.

Agency Response: The Division disagrees. Any notice is deemed received by the Division when filed at any Division office.

Proposed §140.8(f)(2)

Comment: Commenter recommends worker's compensation insurance carriers be notified of the filing of a notice of subclaimant status; and, that §140.8(f)(2) should be amended to include this provision. Commenter recommends §140.8(f)(2) be amended to provide that the notice may be filed with the Division Field Office responsible for managing the injured employee's claim; and, that the notice must also be filed with workers' compensation insurance carrier. Commenter states that this recommendation for filing the subclaimant notice will result in the notice being filed with either the appropriate Division field office or the Division's central office so that the notice can be matched up with the correct claim.

Agency Response: The Division disagrees. Prior to filing for Notice of Subclaimant Status, the party must file a request for reimbursement with the workers' compensation insurer and have that request denied. Filing a Notice of Subclaimant Status merely al-

lows the subclaimant to be notified of any further proceedings on the claim. The workers' compensation insurer is already aware of the existence and claim of the subclaimant, based on the Request for Reimbursement. Within the Division, filings with a field office are the same as filing with the Central Office and matters are administratively forwarded. Central filing is not required nor necessary.

Proposed §140.8(f)(4)

Comment: Commenter recommends that §140.8(f)(4) include a requirement for a separate notice for each health care provider involved.

Agency Response: The Division agrees; however, the current provisions are adequate to satisfy the concern of the comment.

Proposed §140.8(f)(6)

Comment: Commenter recommends the addition of a new paragraph in §140.8(f) to read as follows:

"(6) Abatement of Subclaim. If reimbursement has been denied under subsection (d)(2) because of a pending contested case and subclaim filed, the subclaimant may not request dispute resolution until resolution of the pending contested case. If the contested case is determined compensable, settled, or agreed the carrier shall review the abated subclaim pursuant to the deadlines established under subsection (c) for reimbursement requests and reimburse the abated subclaim pursuant to subsection (d)(1) and issue an explanation of benefits pursuant to subsection (d)(3). If reimbursement of the abated subclaim is denied pursuant to subsection (d)(2), then the subclaimant may seek dispute resolution under subsection (g)."

Commenter states this provision would create a process to efficiently address pre-existing contested case determinations of compensability and then defines how workers' compensation insurance carriers and health care insurers can resolve a pending subclaim subsequent to the resolution of the pending contested case.

Agency Response: The Division cannot agree with the comment or the recommended addition. The statutory language obviously contemplates the ability of a subclaimant to independently raise its remedies and proceed; therefore, the Division does not have the authority to create the recommended "abatement" of the subclaim. The injured employee is required to be noticed of the action and therefore has the ability to intervene, if appropriate or seek other action deemed necessary.

Proposed §140.8(g)

Comment: Commenter asserts that §140.8(g) attempts to refer disputes into resolution disputes already defined and operating under existing rules which is problematic. First, existing dispute resolution rules were not written to address the type and nature of disputes that will now be generated and addressed under the adopted rule. Second, the categorization of dispute types by reason for denial is not effective or logical in determining the form of dispute resolution that should apply, citing examples such as when the categories are not mutually exclusive--meaning the rule is unclear as to which dispute resolution applies in any given case. Third, the categories place a workers' compensation insurance carrier refusal or failure to respond within a legitimate dispute category creating an incentive for workers' compensation insurance carriers to ignore the requirements to respond timely.

Commenter recommends amendments to the proposed rule because the Division has incorrectly divided the disputes into three categories. Commenter states that the first category (Claim or Treatment Not Compensable) includes two very different types of denials that should not be placed within the same category and directed to BRC/CCH. Commenter further reasons that the second dispute category under adopted §140.8(g), Lack of Medical Necessity, focuses on a single form of carrier objection which appears to be crafted to coincide with the existing MDR definitions of §133.308 rather than the actual nature of subclaimant disputes. Commenter also states that the third adopted dispute category (Reduction, Denial or Failure to Respond) combines a peculiar amalgam of underpayments, unspecified denials and failure to respond.

The commenter recommends four generic dispute types: compensability disputes, medical benefit disputes, medical fee disputes, and non-response. Specifically, the commenter recommends under §140.8(g) that the rules applicable to dispute resolution would vary according to the "underlying nature of the dispute between the carrier and subclaimant" and not according to the "reason for denial of reimbursement" as adopted by the Division. The commenter states that compensability disputes should be restricted to determining compensability of an injury or illness through the BRC/CCH process and therefore recommends deleting "or Treatment" from §140.8(g)(1). The commenter recommends deletion of "of the carrier's utilization review agent" from subsection (g)(2)(A) because, per the commenter, the health care insurer will have no knowledge of who the entity is because unlike a typical workers' compensation treatment situation, the denial for reimbursement would only come from the workers' compensation insurance carrier and not the utilization review agent. The commenter explains that the medical benefit dispute category is appropriate because the dispute involves a compensable injury or illness with disagreements as to whether specific health care services paid by the health care insurer are medical services under the Act.

Agency Response: The Division disagrees with the comment and declines to make the changes. In response to the three points raised by the commenter, the Division notes:

First, the proposed sections take into consideration the fact that the dispute resolution procedures referred to are existing procedures. Such provisions are necessary for compliance with §409.0091(l) and (m). Section 409.0091(l) provides in part, "Any dispute that arises from a failure to respond to or a reduction or denial of a request for reimbursement of services that form the basis of the subclaim must go through the appropriate dispute resolution process under this subtitle and division rules." Section 409.0091(m) provides "In a dispute filed under Chapter 410 that arises from a subclaim under this section, a hearing officer may issue an order regarding compensability or eligibility for benefits and order the workers' compensation insurance carrier to reimburse health care services paid by the health care insurer as appropriate under this subtitle. Any dispute over the amount of medical benefits owed under this section, including medical necessity issues, shall be determined by medical dispute resolution under §413.031 and §413.032." Section 140.8(g)(1) concerns indemnity disputes that are based on lack of compensability. In this context the compensable disputes are whether the claimed injury is compensable and whether the requested medical fee is for medical care for an injurious condition that is part of the compensable injury. Subclaimants who wish to file a request for dispute resolution for such a dispute are referred to §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference), because it contains the Division rules promulgated pursuant to Labor Code Chapter 410. Section 140.8(g)(2) con-

cerns disputes that are based on lack of medical necessity and §140.8(g)(3) concerns fee disputes. Subclaimants who wish to file a request for dispute resolution for such disputes are referred to §133.307 and §133.308 of this title, because these are the Division rules promulgated pursuant to Labor Code §413.031 and §413.032. Subclaimant disputes are already handled in "Exceptions" and are specifically listed in §140.8(g)(2) and (3) to address differences that are necessary to address subclaimant disputes. Division proceedings under Labor Code Chapter 410 currently include subclaimants, so no exceptions for subclaimants need to be included in §140.8(g)(1).

The Division declines to make the suggested changes to §140.8(g)(2), because the framework for referring evaluation of "medical benefits" to independent review organizations as suggested by the commenter would not be in compliance with the Labor Code or Texas Department of Insurance rules adopted under the Insurance Code. Specifically, Labor Code §413.031(d) provides that independent review organizations are to review "the medical necessity of a health care service," and §12.5 defines "independent review organization" as "An entity that is certified by the commissioner to conduct independent review under the authority of the Act...." and "independent review" as "A system for final administrative review of the medical necessity and appropriateness of health care services being provided or proposed to be provided to an individual..." As described by the commenter, review of a "medical benefit" to determine whether it was "(i) reasonably required for the diagnosis, evaluation, or treatment of the compensable injury or illness; and (ii) intended to cure or relieve the effects of the injury or illness; or (iii) intended to promote the injured employee's recovery; or (iv) intended to enhance the employee's ability to return to work or retain employment," would not be a review of medical necessity, but rather a review of compensability. As such, it would not be appropriate for an independent review organization to perform such a review.

The Division disagrees with the comment and declines to make the requested changes regarding a workers compensation insurance carrier's failure to respond to a request for reimbursement, because the requested change would violate §409.0091(q). Section 409.0091(q) provides: "An action or failure to act by a workers' compensation insurance carrier under this section may not serve as the basis for an examination or administrative action by the department or the division, or for any cause of action by any person, except for judicial review under this subtitle." If the Division were to order immediate payment of the request for reimbursement because a workers' compensation insurance carrier failed to respond to a request for reimbursement, it would constitute an administrative action in violation of §409.0091(q).

Proposed §140.8(g)(1)

Comment: Some commenters recommend that one of the categories of disputes that can be requested for dispute resolution should be changed from "Claim or Treatment Not Compensable" to "Treatment Not Related to the Compensable Injury" because no compensability disputes may be brought under §409.0091. Commenter explained that subclaimants under §409.0091 may not file a subclaim on a workers' compensation claim that the comp carrier has denied and the injured employee is not pursuing. Thus there will be no disputes over compensability as the stricken language exceeds the statutory authority provided by HB 724. Because compensability is beyond the scope of HB 724, the first commenter also recommends deleting "compensability" from subsection (g)(1)(A), deleting subsection (g)(1)(B) entirely and deleting "compensability" from subsection (g)(1)(C). Commenter supports that §140.8(g)(1) should be rewritten "Treatment Not Related to the Compensable Injury" because Section 11 of HB 724 clearly states that the law applies to subclaims based on an injury that has not been denied for compensability, or that has been determined by the Division to be compensable.

Agency Response: The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Comment: Commenter asserts that the subclaimant has no independent right to pursue compensability. The commenter states that §409.009 grants no more than the right to "file" a claim. Section 11 of HB 724 specifically provided that "[t]he changes made by this Act apply only to subclaims based on an injury that has not been denied for compensability or that has been determined by the division to be compensable." Thus, the commenter reasons that §409.009(m) must be read in this context. Further, subsection (m) explicitly references Chapter 410 of the Labor Code (Adjudication of Disputes). Chapter 410 discusses the parties to disputes under that chapter in Labor Code §410.006: the claimant and the insurance carrier. Subclaimants are not mentioned. Health care providers are not mentioned. While the Labor Code §413.0311 (relating to Review of Certain Medical Disputes; Contested Case Hearing) also references Chapter 410, it does so only as a matter of procedure as evidenced by the use of the word "manner." Thus, per commenter, subsection (m), particularly when read in light of Section 11 of HB 724, merely provides that if the subclaimant files a claim for reimbursement, and if the claimant then elects to pursue the claim, then the hearing officer may make a finding of compensability. The commenter concludes that to hold otherwise would be to render Section 11 meaningless and since subsection (m) and Section 11 may be read together, they must be.

Agency Response: The Division disagrees. The authority of the Division to provide dispute resolution to subclaimants is fully discussed in the reasoned justification portion of this preamble.

Comment: Commenter states that this entire subsection is outside the rulemaking authority of the Commissioner and conflicts with Section 11 of HB 724 which clearly states that the law (§409.0091) applies only to a subclaim based on a compensable injury occurring on or after September 1, 2007 *and* based on an injury that has not been denied for compensability, or has been determined by the Division to be compensable. The health care insurer and its authorized representative have standing to pursue a subclaim only if the workers' compensation insurance carrier has either accepted compensability, has accepted the medical condition, or if the Division has rendered a final decision that the injury is compensable or a final decision that determines the medical condition is part of the compensable injury. Commenter recommends deletion of the entire subsection and replacing it with the following: "(1) Claim or Treatment Not Compensable. The health care insurer or its

authorized representative may file a reimbursement request under subsection (b) of this rule with the workers' compensation insurance carrier within 18 months of payment for the services if the workers' compensation has accepted the liability for the claim or treatment within the period of time or if the Division has determined that the claim is compensable or that the treatment is part of the compensable injury within the period of time."

Agency Response: The Division disagrees. If the requester meets the requirements for subclaimant status under §409.009, they may request a benefit review conference to pursue a compensability dispute under that section. The authority of the Division to provide dispute resolution to subclaimants is fully discussed in the reasoned justification portion of this preamble.

Comment: Some commenters recommend deleting the subsection because the specific provisions of §409.0091, are effective September 1, 2007, there is no statutory authority in HB 724 (notably Section 11) allowing a subclaimant health care insurer or authorized representative to pursue compensability determinations, and §409.009 does not apply to certain health care insurers, as defined in §409.0091(a). In the alternative, both commenters recommend the following language as a substitute: "(B) The health care insurer, other than a health care insurer as defined by §409.0091(a), may pursue dispute resolution to establish that the injury claim is compensable under §409.009 and §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures)."

Agency Response: The Division declines to make the suggested changes. The authority of the Division to provide dispute resolution to subclaimants is fully discussed in the reasoned justification portion of this preamble.

Proposed §140.8(g)(2)(B)

Comment: Commenter recommends revision of the subsection by adding the following at the end of the sentence "... except that appeal of an IRO decision will be made to the State Office of Administrative Hearings as provided in Labor Code §413.031 and not under §133.308(t) of this title." The commenter maintains that §409.0091 specifically says that dispute resolution shall be under §413.031 and §413.032 and specifically excludes reference to §413.0311 passed in the same legislation as the new §409.0091. Thus, the commenter contends that any omission in legislation must be assumed to have been done for a reason so the statute should not be construed to include a section that is not explicitly included.

Agency Response: The Division disagrees with the comment and declines to make a change. Resolution of disputes is addressed in §409.0091(l) and (m). Section 409.0091(l) provides, in part, "Any dispute that arises from a failure to respond to or a reduction or denial of a request for reimbursement of services that form the basis of the subclaim must go through the appropriate dispute resolution process under this subtitle and division rules." Section 409.0091(m) provides, in part, "Any dispute over the amount of medical benefits owed under this section, including medical necessity issues, shall be determined by medical dispute resolution under §413.031 and §413.032." Pursuant to these provisions, a fee dispute or a medical necessity dispute resulting from a request for reimbursement under §409.0091 should be resolved under the Division's medical dispute resolution process and §413.031 and §413.032. These sections provide the initial level of dispute resolution for fee disputes and medical necessity disputes. Fee disputes fall under §413.031(c); pursuant to this section the Division has the role of resolving disputes over the amount of payment due. Medical necessity disputes fall under §413.031(d) and (e); pursuant to these subsections, medical necessity disputes are resolved through use of an Independent Review Organization (IRO), and §413.032 establishes the minimum elements that must be included in an IRO decision. Additionally, §413.031(f) provides, "The commissioner by rule shall specify the appropriate dispute resolution process for disputes in which a claimant has paid for medical services and seeks reimbursement."

After the initial level of dispute resolution under §413.031(c), (d), (e), or (f), parties with an unresolved dispute are entitled to an administrative hearing. Section 413.0311 applies to disputes that have been through the initial process as set out in §413.031(b) - (i) and that involve a medical fee dispute in which the amount of reimbursement sought by the requestor in its request for medical dispute resolution does not exceed $2,000 or an appeal of an IRO regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000. It provides for a hearing by a Division hearing officer under Labor Code Chapter 410, Subchapter D. Section 413.031(l) applies to a medical dispute regarding spinal surgery that remains unresolved after a review by an independent review organization as provided by subsections (d) and (e), and provides for dispute resolution as provided by Chapter 410. Section 413.031(k) applies to any dispute that does not fall under §413.0310 or §413.031(l), and provides for a State Office of Administrative Hearings (SOAH) hearing.

Comment: Some commenters state that this subsection should be limited to health care insurers as defined in §409.0091(a) meaning "an insurance carrier and an authorized representative of an insurance carrier, as described by §402.084(c-1)." Commenters also state that since §409.0091(m) provides that any dispute over the amount of medical benefits owed under this section, including medical necessity issues, shall be determined by medical dispute resolution under §413.031 and §413.032, and does not reference §413.0311, §413.0311 applies only to listed medical disputes that remain unresolved after applicable review under §413.031(b) - (i). Further, commenters point out that health care insurer disputes are not listed in §413.031(b) - (i). Thus, commenters recommend that the subsection conform to the statute so that all health care insurer subclaimant appeals regarding medical necessity go to the State Office of Administrative Hearings.

Agency Response: Adopted §140.8 is limited to health care insurers as defined in §409.0091(a). In some instances disputes arising from subclaimant claims should proceed to SOAH. Resolution of disputes is addressed in §409.0091(l) and (m). Section 409.0091(l) provides, in part, "Any dispute that arises from a failure to respond to or a reduction or denial of a request for reimbursement of services that form the basis of the subclaim must go through the appropriate dispute resolution process under this subtitle and division rules." Section 409.0091(m) provides, in part, "Any dispute over the amount of medical benefits owed under this section, including medical necessity issues, shall be determined by medical dispute resolution under §413.031 and §413.032."

Pursuant to these provisions, a fee dispute or a medical necessity dispute resulting from a request for reimbursement under §409.0091 should be resolved under the Division's MDR process and §413.031 and §413.032. These sections provide the initial

level of dispute resolution for fee disputes and medical necessity disputes.

Fee disputes fall under §413.031(c); pursuant to this section the Division has the role of resolving disputes over the amount of payment due. Medical necessity disputes fall under §413.031(d) and (e); pursuant to these subsections, medical necessity disputes are resolved through use of an Independent Review Organization (IRO), and §413.032 establishes the minimum elements that must be included in an IRO decision. Additionally, §413.031(f) provides, "The commissioner by rule shall specify the appropriate dispute resolution process for disputes in which a claimant has paid for medical services and seeks reimbursement."

After the initial level of dispute resolution under §413.031(c), (d), (e), or (f), parties with an unresolved dispute are entitled to an administrative hearing. Section 413.0311 applies to disputes that have been through the initial process as set out in §413.031(b) - (i) and that involve a medical fee dispute in which the amount of reimbursement sought by the requestor in its request for medical dispute resolution does not exceed $2,000 or an appeal of an IRO regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000. It provides for a hearing by a Division hearing officer under Labor Code Chapter 410. Section 413.031(l) applies to a medical dispute regarding spinal surgery that remains unresolved after a review by an independent review organization as provided by subsections (d) and (e), and provides for dispute resolution as provided by Chapter 410. Section 413.031(k) applies to any dispute that does not fall under §413.0310 or §413.031(l), and provides for a SOAH hearing.

Proposed §140.8(g)(2)(C) and (g)(3)(B)

Comment: Commenter recommends clarification regarding §140.8(g)(2)(C) and how it works with certain provisions of §133.308 (relating to MDR by Independent Review Organizations). The commenter states the adopted rule requires that a subclaimant shall follow the independent review process allowed for a non-network health care provider seeking retrospective review under §133.308 and provides certain exceptions from that rule for health care insurer subclaimants. Section 133.308(j) provides for reasons that the Department may dismiss a request for medical necessity dispute resolution including that "the Department has previously resolved the dispute for the date(s) of health care in question." The commenter maintains that an health care insurer subclaimant may be filing a dispute for dates of service that were the subject of a dispute between a health care provider and a workers' compensation insurance carrier. Thus, the rule should clarify that §133.308(j)(4) does not apply to medical necessity dispute filed by an health care insurer subclaimant unless the dispute that was previously resolved was based on a filing by the subclaimant for the dates of health care in question.

Commenter also recommends clarification regarding §140.8(g)(3)(B) related to the reasons for dismissal in the medical fee dispute resolution process allowed for a health care provider under §133.307 (relating to MDR of Fee Disputes). Under §133.307(e)(3), the Department may dismiss a request for medical fee dispute among others, if the fee disputes for the dates of health care in question have been previously adjudicated by the Division; and the Division determines that the medical fee dispute is for health care services provided pursuant to a private contractual fee arrangement. The commenter states that an health care insurer subclaimant may be filing a dispute for dates of service that were the subject of a dispute between a health care provider and a workers' compensation insurance carrier.

Commenter recommends that the Division should clarify that §133.307(e)(3)(D) does not apply to a medical fee dispute filed by an health care insurer subclaimant unless the dispute that was previously resolved was based on a filing by the subclaimant for the dates of the health care in question. Many disputes filed by health care insurer subclaimants involve health care services provided by health care providers participating as contracted providers with health insurers.

While §133.307(e)(3)(F) was intended to apply to a contractual fee arrangement between a workers' compensation insurance carrier or network, the commenter recommends that the Division clarifies that §133.307(e)(3)(F) does not apply to a contractual fee arrangement between a health care insurer and health care provider. The commenter recommends that the Division can make the clarification regarding both subsections either in the rule preamble or by amendments to the text.

Agency Response: The Division disagrees with the recommended clarification of §140.8(g)(2)(C). The recommended change is contrary to the statutory language in §409.0091(d).

The Division disagrees with the recommended clarification of §140.8(g)(3)(B). Section 133.307(e)(3)(F) does apply to a contractual fee agreement between a health care insurer and health care provider. Further, §409.0091(h) provides that "For each medical benefit paid, the workers' compensation insurance carrier shall pay to the health care insurer the lesser of the amount payable under the applicable fee guideline as of the date of service or the actual amount paid by the health care insurer."

Proposed §140.8(g)(3)(A)

Comment: Commenters recommend deletion of §140.8(g)(3)(A). Commenter states that the Division has no statutory authority for an extension of the timelines contained in §409.0091. Additionally, the commenter asserts no compensability disputes may be brought under §409.0091 because Section 11 of HB 724 clearly says that subclaimants under §409.0091 may not file a subclaim for an injury that is not compensable. Thus, commenter recommends deleting the subsection in its entirety. Commenter justifies the deletion since §409.009(n) does not provide for another 60 days to be allotted for filing a medical dispute resolution with the Division after the date the requestor receives the final decision on compensability or extent of injury issues. Commenter states that §402.084(c-1) health care insurers and their authorized agents do not have standing to raise compensability and extent of injury issues as a result of HB 724 Section 11. Commenter also refers to §409.0091(n) and adds that it does not have any exceptions other than the exceptions found in subsection (s) and what is adopted is not a subsection (s) exception. The commenter maintains that because the legislature has specifically addressed the limitation periods, the Division is without rulemaking authority to alter those limitation periods in any way. Commenter states that there is no statutory provision under §409.0091(n) or elsewhere that gives the Commissioner the authority to extend the time to file for medical dispute resolution by allowing 60 additional days after the requestor receives the final decision on compensability or extent of injury issues. Aside from requesting the subsection to be deleted, the commenter also recommends that the Division limits the

definition of subclaimants to health care insurers as defined in §409.0091(a).

Agency Response: The Division disagrees. Section 409.0091(n) only applies to requests for reimbursement and not when dispute resolution must begin. The Division is authorized to establish timelines for other procedures by §409.0091(r).

The Division disagrees with the recommendation that the Division limit the definition of subclaimants to health care insurers as defined in §409.0091(a). The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

Proposed §140.8(g)(3)(B)

Comment: Some commenters recommend that §140.8(g)(3)(B) be limited to health care insurers as defined in §409.0091(a). Those commenting state that any disputes over the amount of medical benefits owed under this section, including medical necessity issues would be determined under Labor Code §413.031 (relating to Medical Dispute Resolution) and §413.032 (relating to Independent Review Organization; Appeal). The comments also state that §409.0091(m) does not reference §413.0311 that creates a review for certain medical disputes and contested case hearings. Commenters further state that §413.0311 applies only to enumerated medical disputes that remain unresolved after any applicable review under §413.031(b) - (i) and health care insurer disputes are not listed in §413.031(b) - (i). Thus, commenters recommend that the Division amend this subsection and conform to the statute so that all health care insurer subclaimant appeals regarding medical fee issues go to the State Office of Administrative Hearings.

Agency Response: Section 140.8 is limited to health care insurers as defined in §409.0091(a). In some instances disputes arising from subclaimant claims should proceed to SOAH. Resolution of disputes is addressed in §409.0091(l) and (m). Section 409.0091(l) provides, in part, "Any dispute that arises from a failure to respond to or a reduction or denial of a request for reimbursement of services that form the basis of the subclaim must go through the appropriate dispute resolution process under this subtitle and division rules." Section 409.0091(m) provides, in part, "Any dispute over the amount of medical benefits owed under this section, including medical necessity issues, shall be determined by medical dispute resolution under §413.031 and §413.032."

Pursuant to these provisions, a fee dispute or a medical necessity dispute resulting from a request for reimbursement under §409.0091 should be resolved under the Division's medical dispute resolution process and §413.031 and §413.032. These sections provide the initial level of dispute resolution for fee disputes and medical necessity disputes.

Fee disputes fall under §413.031(c); pursuant to this section the Division has the role of resolving disputes over the amount of payment due. Medical necessity disputes fall under §413.031(d) and (e); pursuant to these subsections, medical necessity disputes are resolved through use of an Independent Review Organization (IRO), and §413.032 establishes the minimum elements that must be included in an IRO decision. Additionally, §413.031(f) provides, "The commissioner by rule shall specify the appropriate dispute resolution process for disputes in which a claimant has paid for medical services and seeks reimbursement."

After the initial level of dispute resolution under §413.031(c), (d), (e), or (f), parties with an unresolved dispute are entitled to an administrative hearing. Section 413.0311 applies to disputes that have been through the initial process as set out in §413.031(b) - (i) and that involve a medical fee dispute in which the amount of reimbursement sought by the requestor in its request for medical dispute resolution does not exceed $2,000 or an appeal of an IRO regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000. It provides for a hearing by a Division hearing officer under Labor Code Chapter 410, Subchapter D. Section 413.031(l) applies to a medical dispute regarding spinal surgery that remains unresolved after a review by an independent review organization as provided by subsections (d) and (e), and provides for dispute resolution as provided by Chapter 410. Section 413.031(k) applies to any dispute that does not fall under §413.0310 or §413.031(l), and provides for a SOAH hearing.

Proposed §140.8(h)

Comment: Commenter opines that the adopted language may actually cause more problems than it solves. For example, it may not be possible to get a release for all services in which case the proposed language could require the carrier to pay both parties. The commenter further states that the statute provides for a defense for payment and there are no requirements or limitations on that defense. The commenter recommends adding language that protects the workers' compensation carrier from paying more than the maximum payment allowed under §409.0091, and language that tracks the normal legal rule that the first in time has the rights.

Commenter recommends that §140.8(h) be limited to health care insurers as defined in §409.0091(a), a continuation of its premise that the rule should not confer on all subclaimants the party status that is only statutorily authorized for certain "health care insurer" subclaimants, as that term is defined in §409.0091(a) and recommends that §140.6(c) be moved to §140.7. The commenter specifically recommends that the Division rewrite §140.8(h) to add language that in no event may a workers' compensation insurance carrier be required to make payment above the maximum allowable reimbursement as set forth in the Texas Workers' Compensation Act and Division rules.

Agency Response: The Division does not agree with these comments. The Division sees a need to provide rules to meet these contingencies and does so within the authority of §409.0091(r). Payment of a bill is an absolute defense to a claim.

§140.8(h)(1) and (2)

Comment: Commenters assert that this subsection is outside the rulemaking authority of the Division because, under §409.0091(e), the defense that the carrier has already paid for the services has not been taken away by the Legislature. Further, the comments state that it is clear under §409.0091(g) and (h) that the workers' compensation insurance carrier will never have to pay for the services more than one time and that the maximum amount that the carrier will ever have to pay is "the lesser of the amount payable under the applicable fee

guideline as of the date of service or the actual amount paid by the health care insurer." For those reasons, commenter recommends that §140.8(h)(1) should be amended to read, "In no event will the worker's compensation insurance carrier be required to make payment for the medical services individually or in the aggregate in an amount in excess of the maximum payment allowed under §409.0091(g) and (h)." Commenter recommends amending §140.8(h)(1) to read, "In no event will the worker's compensation insurance carrier be required to make payment for the medical services individually or in the aggregate in an amount in excess of the maximum payment allowed under §409.0091(g) and (h). Commenters recommend amending §140.8(h)(2) to read, "The first subclaimant in time to file a dispute with the Division is the only subclaimant that has a right to dispute resolution and reimbursement for those specific services rendered."

Agency Response: The Division disagrees. The rule does not preclude the statutory defense of a prior payment for the medical care that is the subject of the reimbursement request. This subsection merely sets out a non-exclusive process to help those involved to decide which of the multiple entities attempting to collect payment for the same medical service should be paid.

General Comments

Comment: Commenter requests that the fiscal impact be revisited by getting specific information from the State Office of Risk Management, workers' compensation carriers, and other affected parties.

Commenter states that the rules as adopted will negatively impact injured employees because injured employees will lose control over their own claim and lose their due process rights when their claim can be adjudicated in their absence.

Commenter states the Division and workers' compensation insurance carriers will be negatively impacted by increased disputes where compensability has not been disputed by the injured employee or where the reimbursement request could have been paid if the workers' compensation insurance carrier had all the information to properly review the request. Workers' compensation insurance carriers will experience increased costs due to their inability to clarify whether the treatment was truly for the injury. In addition, the commenter maintains that the rules allow subclaimant disputes to take unnecessary time and resources away from the workers' compensation's system's primary goal of getting the injured employee health care and income benefits.

Commenter states that the impact statement of the adopted rule indicates that subclaimant reimbursement requests will not take any more time to process than a medical bill. Commenter states workers' compensation insurance carriers have already experienced the processing of these requests, and they take much longer than a normal medical bill. The information provided is not in one place and in one format and is not on the standard form required for medical bills, which requires manual processing. Commenter states grandfathered claims involve archiving and labor to pull the files. Additionally, since some of the information required for many bill review systems is not required of these subclaimants, manual default codes must be inserted to allow the automated process in the bill review to move forward. Commenter asserts that the rule will result in additional costs and that the rule presupposes that it is not doing anything more than is required under the legislation and thus, if there is a cost, it is due to the legislation not to the rule.

Agency Response: The comment is directed more at the statutory requirements, rather than the rules. The rules are mere implementation of the mandate of the statute. The Division has no authority to study, alter, or delete statutory provisions without a statutory mandate. The Division sees no reason or basis to review the processing times and costs involved.

Comment: Commenter recommends, with no explanation, rewriting all of the adopted rules.

Agency Response: The Division declines to accept the revisions. Without an explanation of the reason and basis for the recommended changes to the rule language, the submission does not constitute a comment and the Division has nothing to which to respond.

Comment: Commenter states that the rules as proposed would allow a subclaimant to independently pursue issues of compensability, and this is potentially prejudicial to the interests of an injured employee. Commenter states that the proposed rules do not contain the appropriate safeguards to prevent such prejudice. Commenter asserts that the cited case of *Texas Mutual Ins. Co. v. Sonic Systems Int'l* rejected the subclaimant's position that §409.009 allows a party to seek reimbursement as a subclaimant and that a subclaimant's right to pursue recovery is wholly derivative of the injured employee's right. Commenter states that the proposed adopted rules do not in any way guarantee that an injured employee has, *in fact*, received notice of the hearing.

Agency Response: The Division disagrees. In any dispute the injured employee is required to be given notice at that injured employee's last known address of record. If the injured employee has an objection to the timing of the hearing, the injured employee may request a continuance. Historically, subclaimants have been allowed to file these disputes without the participation under §409.009. New §140.6 affords safeguards for the injured employee that did not exist by rule before. The notice requirement in §140.8(d)(1)(E) requires the carrier to give its response to the reimbursement request to the injured employee and health care provider.

Comment: A comment requests that the Division withdraw the proposed rules, and re-propose language that is more closely aligned with the statutory language and legislative intent.

Agency Response: The Division is of the opinion that the rules as adopted, are aligned with the statutory language. The Division considers the rules to be necessary and appropriate implementation language for the statutory provisions. The Division does not agree there is a need to withdraw the proposed rules, nor does it think that public interest would be served in doing so.

Comment: A comment recommends the Division withdraw the adopted rules and re-propose rules with specific separate process for §409.009 and §409.0091 classes of subclaimants. The first rule should establish the rights and procedures as well as expectations of the different disputing parties who are parties to subclaimant disputes, whether they are under §409.009 or §409.0091 without mingling the rights of the parties that are separate and distinct and under separate sections of the statute. The second rule should focus on the process for subclaims that arise out of §409.009. The third rule should focus on the process of §409.0091 claims. Further, disputes that remain after the IRO process and after the fee dispute process, should go to SOAH.

Agency Response: Section 140.8 of the adopted rule applies to §409.009 subclaimants. Section 140.7 and §140.8 apply to §409.0091 subclaimants. The Division disagrees that §409.0091 is the exclusive remedy for a §402.084(c-1) health care insurer. No such exclusive remedy language is contained in §409.0091. Additionally, §409.009 was not amended to exclude §402.084(c-1) health care insurers. Section 409.0091 allows a health care insurer to bring a claim which resulted from a data match, and limits the defenses available to a workers' compensation insurance carrier. Section 409.009 allows any person who has provided compensation, directly or indirectly, to or for an employee or beneficiary, and has sought and been refused reimbursement, to pursue dispute resolution.

The Division is of the opinion that the rules as adopted, are aligned with the statutory language. The Division considers the rules as necessary and appropriate implementation language for the statutory provisions. The Division does not agree there is a need to withdraw the proposed rules, nor does it think that public interest would be served in doing so.

In some instances, disputes arising from subclaimant claims will proceed to SOAH. Resolution of disputes is addressed in §409.0091(l) and (m). Section 409.0091(l) provides, in part, "Any dispute that arises from a failure to respond to or a reduction or denial of a request for reimbursement of services that form the basis of the subclaim must go through the appropriate dispute resolution process under this subtitle and division rules." Section 409.0091(m) provides, in part, "Any dispute over the amount of medical benefits owed under this section, including medical necessity issues, shall be determined by medical dispute resolution under Labor Code §413.031 and §413.032."

Pursuant to these provisions, a fee dispute or a medical necessity dispute resulting from a request for reimbursement under §409.0091 should be resolved under the Division's medical dispute resolution process and §413.031 and §413.032. These sections provide the initial level of dispute resolution for fee disputes and medical necessity disputes.

Fee disputes fall under §413.031(c); pursuant to this section the Division has the role of resolving disputes over the amount of payment due. Medical necessity disputes fall under §413.031(d) and (e); pursuant to these subsections, medical necessity disputes are resolved through use of an Independent Review Organization (IRO), and §413.032 establishes the minimum elements that must be included in an IRO decision. Additionally, §413.031(f) provides, "The commissioner by rule shall specify the appropriate dispute resolution process for disputes in which a claimant has paid for medical services and seeks reimbursement."

After the initial level of dispute resolution under §413.031(c), (d), (e), or (f), parties with an unresolved dispute are entitled to an administrative hearing. Section 413.0311 applies to disputes that have been through the initial process as set out in §413.031(b) - (i) and that involve a medical fee dispute in which the amount of reimbursement sought by the requestor in its request for medical dispute resolution does not exceed $2,000 or an appeal of an IRO regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000. It provides for a hearing by a Division hearing officer under Labor Code Chapter 410, Subchapter D. Section 413.031(l) applies to a medical dispute regarding spinal surgery that remains unresolved after a review by an independent review organization as provided by subsections (d) and (e), and provides for dispute resolution as provided by Chapter 410. Section 413.031(k) applies to any dispute that does not fall under §413.0310 or §413.031(l), and provides for a SOAH hearing.

Comment: Commenter states subclaimants under §409.0091 should not be allowed to pursue compensability issues because §409.003 gives only a claimant the right to file a claim for benefits.

Agency Response: The Division disagrees. Section 409.009 gives the right to a subclaimant to file a claim. Without the right to enforce payment of its claim through the DWC statutory and rules provisions, the status of subclaimant under §409.009 would be meaningless. The authority of the Division to provide dispute resolution to subclaimants is fully discussed in the Reasoned Justification portion of this preamble.

Comment: Commenter states the proposal preamble did not address the statutory amendments to §408.027(d) which were enacted with the passage of HB 724. Commenter recommends the preamble include language to reference §408.027(d) because this statutory language is important in establishing the rights of subclaimants to reimbursement and dispute resolution.

Agency Response: The Division disagrees. The amendments to §408.027(d) reference a right to recovery under §409.009 and §409.0091. No separate rules or preamble language is needed for §408.027(d).

Comment: Commenters assert that the proposal preamble states that the rules as proposed do not address the reimbursement provisions of certified Workers' Compensation Health Care Networks because those provisions are addressed in Chapter 1305 of the Texas Insurance Code.

Commenter states there is no statutory authority for this statement. Commenter asserts the language of §408.027(d) does not discriminate among claims served by networks and claims not served within networks. Commenters state that this statement may imply that adopted §§140.6 - 140.8 prevent a person from seeking reimbursement or dispute resolution for medical services paid by a person if that medical service should have been treated in a workers' compensation health care network had the medical service been originally identified as a workers' compensation benefit. Commenter recommends this statement be clarified because health care insurers should clearly have the ability to seek recovery for health care services related to compensable injuries whether or not the services were provided within a network.

Agency Response: The Division clarifies that adopted §§140.6 - 140.8 does not prevent a person from seeking reimbursement or dispute resolution for medical services paid by the person when the individual to whom the medical service was provided was subject to treatment through a workers' compensation health care network. However, adopted §§140.6 - 140.8 also do not attempt to supplant the Insurance Code provisions in The Insurance Code Chapter 1305. Insurance Code §1305.003(b) provides in part: "In the event of a conflict between Title 5, Labor Code, and this chapter as to... the resolution of disputes regarding medical benefits provided through those networks, this chapter prevails." This provision is also contained in Labor Code §408.031(b). Therefore, if a provision of the Labor Code Title 5 were to conflict with a provision of Insurance Code Chapter 1305, the Insurance Code Chapter 1305 would prevail. Based on this reasoning, the Division does not have statutory authority to adopt a rule under Title 5 of the Labor Code which is contrary to the Insurance Code Chapter 1305.

The Insurance Code §1305.006 provides: "An insurance carrier that establishes or contracts with a network is liable for the following out-of-network health care that is provided to an injured employee: (1) emergency care; (2) health care provided to an injured employee who does not live within the service area of any network established by the insurance carrier or with which the insurance carrier has a contract; and (3) health care provided by an out-of-network provider pursuant to a referral from the injured employee's treating doctor that has been approved by the network pursuant to Section 1305.103." If a health care insurer believes it has a valid subclaim under the Labor Code §409.0091, it may request reimbursement and pursue dispute resolution. However, if the injured employee for whom the care was provided is subject to certified network requirements, the workers' compensation insurance carrier may not be liable for the health care unless the health care was provided by an in-network provider selected or assigned pursuant to the Insurance Code Chapter 1305 or unless the health care meets one of the three out-of-network exceptions listed in the Insurance Code §1305.006.

Comment: Commenter asserts that there is no statutory authority to limit §409.0091 to subclaimants "who have claims based on data matches with the Division." The commenter states §409.0091 applies to ALL "health care insurers" as that term is defined under specific Labor Code sections. The commenter also states §409.0091(b) states the section applies only to a request for reimbursement by a health care insurer and that there is no limitation stating that the section is ONLY applicable to a health care insurer who have claims based on data matches with the Division. Further, Section 11 of HB 724 states, "The changes made by this Act applies only to subclaims based on an injury that has not been denied for compensability or that has been determined by the division to be compensable." The commenter asserts §409.0091 creates a process applicable to a health care insurer regardless of whether the claim is identified through a data match under §402.084 or some other method.

Agency Response: Section 409.0091(n) states that "Except as provided by subsection (s), a health care insurer must file a request for reimbursement with the workers' compensation insurance carrier not later than six months after the date on which the health care insurer received information under §402.084(c-3)."

Section 409.0091(s) states that "On or after September 1, 2007, from information provided to a health care insurer before January 1, 2007, under §402.084(c-3), the health care insurer may file not later than March 1, 2008:

(1) a subclaim with the division under subsection (l) if a request for reimbursement has been presented and denied by a workers' compensation insurance carrier; or

(2) a request for reimbursement under subsection (f) if a request for reimbursement has not previously been presented and denied by the workers' compensation insurance carrier.

All of the filing deadlines in §409.0091 are tied to the date of a data match. Without a data match, there would be no basis to establish a filing deadline. Therefore, the Division has determined that §409.0091 only applies to cases where there is a data match under §402.084(c-3).

Comment: Commenter questions whether or not the Division will take enforcement action against the representatives of group health insurance companies who exhibit a pattern of practice of not complying with the statute and/or Division rules, e.g. repeatedly failing to appear at benefit review conferences and/or contested case hearings, filing frivolous subclaims, and routinely filing subclaims beyond filing deadlines. The commenter recommends the Division include language in the rule adoption preamble and adopted rules that gives notice of the fact that the agency will initiate enforcement action when it is determined that a pattern of practice exists.

Agency Response: All persons who violate the Texas Workers' Compensation Act or Commissioner rules are subject to enforcement action, as provided in the Act and the Rules. Parties that act in bad faith or that fraudulently make requests for reimbursement should be appropriately penalized, as permitted by the Labor Code; however, the Division disagrees that any modifications to this rule are required to provide for that. Existing statutes in Labor Code and current Division rules in Chapter 180 of this title, relating to Monitoring and Enforcement, already provide penalties for parties that act fraudulently or in bad faith.

Labor Code §415.002(a) provides that an insurance carrier or its representative commits an administrative violation if that person violates a commissioner rule or fails to comply with a provision of this the Workers' Compensation Act. Additionally, Labor Code §415.008 contains provisions making it a class B administrative violation to make a false or misleading statement; misrepresent or conceals material facts; fabricate, alter, conceal, or destroy a document; or conspire to do one of these things; and Labor Code §415.008 makes it a class B administrative to bring, prosecute, or defend an action for benefits under the Workers' Compensation Act, or request initiation of an administrative violation proceeding that does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Finally, §180.2 of this title (relating to Referrals) provides that, "Any person may make a referral to the commission: for fraudulent acts or omissions by any system participant; for failure of a health care provider to provide reasonable and necessary health care; for failure of an insurance carrier to ensure that all and only reasonable and necessary health care is approved and reimbursed in accordance with the Statute and Rules; or for other violations of the Statute or Rules by any system participant."

For, with changes: Medrecovery Management, The 4600 Texas Group, Texas Association of Health Plans.

Against: State Representative Burt Solomons, Insurance Council of Texas.

Neither For Nor Against, with changes: Zenith Insurance Company, American Insurance Association, Service Group Insurance Co., Flahive, Ogden & Latson, Pam Beachly, Office of Injured Employee Counsel, State Office of Risk Management, Texas Mutual Insurance Co.

The new sections are adopted under Labor Code §409.0091(l), which requires the commissioner of insurance and the commissioner of workers' compensation to modify rules under this subtitle as necessary to allow the health care insurer access as a subclaimant to the appropriate dispute resolution process, recognize in the rules the status of a subclaimant as a party to the dispute, and to ensure that the workers' compensation insurance carrier is not penalized, including not being held responsible for costs of obtaining the additional information, if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request; Labor Code §409.0091(o), which requires the commissioner of insurance and the commissioner of workers' compensation to amend or adopt rules to specify the process by which

an employee who has paid for health care services described by Labor Code §408.027(d) may seek reimbursement; Labor Code §409.0091(r), which provides that the commissioner of insurance and the commissioner of workers' compensation may adopt additional rules to clarify the processes required by, fulfill the purpose of, or assist the parties in the proper adjudication of subclaims under this section; Labor Code §413.031 provides for procedures for medical dispute resolution; Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state; Labor Code §402.061 provides that the Commissioner of Workers' Compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act; Labor Code §408.021 entitles an injured employee who sustains a compensable injury to all health care reasonably required by the nature of the injury as and when needed; Labor Code §413.013 requires the Division by rule to establish programs related to health care treatments and services for dispute resolution, monitoring, and review; Labor Code §413.015 requires insurance carriers to pay charges for medical services as provided in the statute and requires that the Division ensure compliance with the medical policies and fee guidelines through audit and review; Labor Code §413.016 provides for refund of payments made in violation of the medical policies and fee guidelines.

§140.6. Subclaimant Status: Establishment, Rights, and Procedures.

(a) Applicability. This section is applicable to a subclaim pursued under Labor Code §409.009, including a subclaim pursued by a health care insurer.

(b) Party status. A subclaimant as described in §409.009 is a party to a claim concerning workers' compensation benefits.

(c) Rights in Relation to the Injured Employee.

(1) A subclaimant may file and pursue a claim for reimbursement of a benefit that has been provided to an injured employee, and is entitled to appropriate dispute resolution in accordance with the Texas Workers' Compensation Act (Act) and Division of Workers' Compensation (Division) rules.

(2) A subclaimant may pursue a claim for reimbursement of a benefit that has been provided to an injured employee and participate in the dispute resolution process without the participation of the injured employee if:

(A) there is no prior written agreement between the injured employee and the workers' compensation insurance carrier or no final decision by the Division on the issue in dispute;

(B) the workers' compensation insurance carrier has denied the entitlement to benefits under the Act and Division rules;

(C) the injured employee is not pursuing dispute resolution to establish the injured employee's entitlement to benefits with reasonable diligence; and

(D) the subclaimant has provided the injured employee with written notice of:

(i) subclaimant's intent to pursue a claim for reimbursement of a benefit;

(ii) warning that a decision rendered may be binding against the injured employee; and

(iii) contact information for the Office of the Injured Employee Counsel.

(3) At a contested case hearing without the participation of the injured employee, the subclaimant must show, in addition to other facts:

(A) subclaimant provided written notice to the injured employee as specified in paragraph (2)(D) of this subsection;

(B) it has contacted the injured employee and the injured employee is not pursuing the dispute with reasonable diligence; or

(C) it has been unable to contact the injured employee through the exercise of reasonable diligence.

(d) Claims for Reimbursement of Medical Benefits.

(1) Subclaimants, other than subclaimants described in §409.0091, must pursue a claim for reimbursement of medical benefits and participate in medical dispute resolution in the same manner as an injured employee or in the same manner as a health care provider, as appropriate, under Chapters 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guidelines for Medical Services, Charges, and Payments).

(2) A health care insurer subclaimant must submit a reimbursement request in the form/format and manner prescribed by the Division and must contain all the required elements listed on the form.

(3) Workers' compensation insurance carriers must process reimbursement requests from subclaimants pursuant to Chapters 133 and 134 of this title.

(e) Contested Case Hearing. A subclaimant may pursue a contested case hearing under the provisions of Chapters 140 - 143 of this title (relating to Dispute Resolution).

§140.7. Health Care Insurer Reimbursement under Labor Code §409.0091.

(a) Applicability. This section applies only to subclaims by a health care insurer based on information received under Labor Code §402.084(c-3).

(b) Health care insurer. "Health care insurer" means an insurance carrier and an authorized representative of an insurance carrier, as described by Labor Code §402.084(c-1).

(c) Reimbursement of Health Care Insurers. A health care insurer may be reimbursed for medical benefits provided to or paid on behalf of an injured employee with a compensable workers' compensation claim in accordance with Labor Code §409.0091, the procedures of §140.8 of this title (relating to Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091), and this section.

(d) Certain Defenses Not Allowed. A workers' compensation insurance carrier shall not deny a reimbursement request under Labor Code §409.0091 from a health care insurer because:

(1) the health care insurer has not sought reimbursement from the health care provider or the health care insurer's insured;

(2) the health care insurer or the health care provider did not request preauthorization under §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) or Labor Code §413.014; or

(3) the health care provider did not bill the workers' compensation insurance carrier, as provided by Labor Code §408.027, before the 95th day after the date the health care for which the health care insurer paid was provided.

§140.8. Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091.

(a) Applicability. This section applies only to subclaims by a health care insurer based on information received under Labor Code §402.084(c-3).

(b) Health care insurer. "Health care insurer" means an insurance carrier and an authorized representative of an insurance carrier, as described by Labor Code §402.084(c-1).

(c) Request to Workers' Compensation Insurance Carrier. A health care insurer seeking reimbursement must first file a reimbursement request with the workers' compensation insurance carrier.

(1) Form. The request must be in the form/format and manner prescribed by the Division of Workers' Compensation (Division) and must contain all the required elements listed on the form.

(2) Notice. The health care insurer must give notice of the request to the injured employee and the health care provider that performed the services that are the subject of the reimbursement request. The notice shall include a copy of the reimbursement request and an explanation that the health care insurer is seeking reimbursement for medical care costs.

(d) Deadlines for Response to Reimbursement Request to the Workers' Compensation Insurance Carrier.

(1) 90 Day Response Deadline. The workers' compensation insurance carrier must respond to a reimbursement request under this section by either paying, reducing, or denying payment in writing not later than the 90th day after the date the reimbursement request was first received, unless additional information is requested, pursuant to paragraph (2) of this subsection.

(2) Request for Additional Information. The workers' compensation insurance carrier may request additional information from the health care insurer if there is not sufficient information to substantiate the claim. The health care insurer has 30 days after receiving the request for more information to provide the information requested to the workers' compensation insurance carrier. Any request for additional information shall be in writing, be relevant and necessary for the resolution of the request. A workers' compensation insurance carrier shall not be penalized, including not being held responsible for costs of obtaining the additional information, if the workers' compensation insurance carrier denies payment in order to move to dispute resolution to obtain additional information to process the request. It is the health care insurer's obligation to furnish its authorized representatives with any information necessary for the resolution of a reimbursement request. The Division considers any medical billing information or documentation possessed by the health care insurer or one of its authorized representatives to be simultaneously possessed by the health care insurer and all of its authorized representatives.

(3) 120 Day Response Deadline. If the workers' compensation insurance carrier has requested additional information from the health care insurer pursuant to paragraph (2) of this subsection, the workers' compensation insurance carrier must respond in writing to the health care insurer's reimbursement request not later than the 120th day after the date the reimbursement request was first received, unless otherwise provided by mutual agreement.

(e) Response to a Reimbursement Request. The workers' compensation insurance carrier must respond to a reimbursement request by either paying, reducing or denying payment.

(1) Paying or Reducing Payment.

(A) The workers' compensation insurance carrier shall pay the health care insurer the lesser of:

(i) the amount payable under the applicable Division fee guideline as of the date of service; or

(ii) the actual amount paid by the health care insurer.

(B) If No Fee Guideline. In the absence of a Division fee guideline for a specific service paid, the amount per service paid by the health care insurer shall be considered in determining a fair and reasonable payment pursuant to §134.1 of this title (relating to Medical Reimbursement).

(C) Interest. The health care insurer may not recover interest as a part of the payable amount.

(D) Previous Payments. The workers' compensation insurance carrier shall reduce any reimbursable amount by any payments the workers' compensation insurance carrier previously made to the same health care provider for the provision of the same health care on the same dates of service. In making such a reduction in reimbursement, the workers' compensation insurance carrier shall provide evidence of the previous payments made to the health care provider.

(E) Notice to Injured Employee and Health Care Provider. The workers' compensation insurance carrier must give notice of its response to the reimbursement request to the injured employee and the health care provider that performed the services that are the subject of the reimbursement request. If the claim is compensable, the notice shall include an explanation that the claim is compensable and that the health care provider must reimburse the injured employee for any amounts paid to the health care provider by the injured employee.

(F) The health care provider may submit a reimbursement request to the workers' compensation insurance carrier for any money owed under Division fee guidelines for the medical services rendered on a compensable claim and is entitled to dispute resolution under §133.307 of this title (relating to MDR of Fee Disputes). The workers' compensation insurance carrier is liable for full payment in accordance with Division fee guidelines and applicable rules for the medical services rendered on a compensable claim.

(2) Explanation of Benefits. The workers' compensation insurance carrier must provide the health care insurer, all health care providers, and the injured employee an explanation of benefits (EOB) in the form and manner prescribed by the Division. The EOB must provide sufficient explanation regarding the basis for a denial of the reimbursement request.

(f) Reimbursement of Injured Employee. If the injured employee's medical care costs are reimbursable under Title 5 of the Labor Code, a health care provider must refund to the injured employee any payments made by the injured employee to the health care provider, including but not limited to, copays and deductibles. Reimbursement must be made within 45 days of receipt of the notice that the claim is compensable.

(g) Filing Notice of Subclaimant Status.

(1) 120 Day Deadline. A health care insurer must file a written notice of subclaimant status with the Division not later than the 120th day after a workers' compensation insurance carrier fails to respond to a health care insurer's reimbursement request or reduces or denies the requested reimbursement amount.

(2) Location for Filing Notice. The notice may be filed with the Division of Workers' Compensation at any local Division field office or at the Division's central office in Austin, Texas.

(3) One Injured Employee Per Notice. A health care insurer must file separate notices for each individual injured employee in which the health care insurer seeks subclaimant status.

(4) One Notice Per Injured Employee Date of Injury. If an individual injured employee has multiple claims based on different dates of injury, the health care insurer must file a separate notice for each date of injury for which medical benefits were provided.

(5) Form. The notice of subclaimant status must be in the form and manner prescribed by the Division.

(h) Request for Dispute Resolution. The rules applicable to dispute resolution vary according to the reason for denial of reimbursement. Disputes regarding extent of injury, liability, or medical necessity must be resolved prior to pursuing a medical fee dispute. A request for medical dispute resolution may be filed in lieu of a request for subclaimant status, and shall be considered a request for subclaimant status for purposes of this section.

(1) Claim or Treatment Not Compensable.

(A) A health care insurer must file a request for a benefit review conference pursuant to §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference) with the Division not later than the 120th day after a workers' compensation insurance carrier reduces or denies the requested reimbursement amount based on compensability or extent of injury issues.

(B) The health care insurer may pursue dispute resolution to obtain an order from a hearings officer regarding compensability or eligibility for benefits in accordance with Labor Code Chapter 410 and applicable Division rules.

(C) A subclaim dispute based on a denial of reimbursement due to compensability or extent of injury is subject to dispute resolution pursuant to Chapters 140 - 143 of this title (relating to Dispute Resolution).

(2) Lack of Medical Necessity.

(A) A health care insurer must file a request for medical dispute resolution with the workers' compensation insurance carrier or the insurance carrier's utilization review agent not later than the 120th day after a workers' compensation insurance carrier reduces or denies the requested reimbursement amount due to lack of medical necessity.

(B) A medical dispute based on the workers' compensation insurance carrier's denial of a health care insurer's reimbursement request due to lack of medical necessity is subject to dispute resolution pursuant to §133.308 of this title (relating to MDR by Independent Review Organizations).

(C) A subclaimant shall follow the independent review process allowed for a non-network health care provider seeking retrospective review of a service under that section, with any modifications specified by this subsection.

(D) A request for reconsideration is not required prior to a request for independent review, notwithstanding the requirements for requesting independent review under §133.308 of this title.

(E) A request for independent review may be filed, notwithstanding the timeliness requirements for filing a request for independent review under §133.308 of this title.

(F) Notwithstanding the provisions of §133.308 of this title, regarding independent review organization requests for additional information, if a health care provider is requested to submit records, the health care insurer shall reimburse the health care provider copy expenses for the requested records.

(3) Reduction, Denial or Failure to Respond.

(A) A health care insurer must file a request for medical dispute resolution with the Division not later than:

(i) the 120th day after a workers' compensation insurance carrier fails to respond to a health care insurer's reimbursement request or reduces or denies the requested reimbursement amount for reasons other than lack of medical necessity; or

(ii) 60 days after the date the requestor receives the final decision, inclusive of all appeals, on compensability or extent of injury issues raised in accordance with this subsection.

(B) A medical dispute based on the workers' compensation insurance carrier's failure to respond to a health care insurer's reimbursement request or the result of a reduction or denial of the requested reimbursement amount for reasons other than those listed in paragraph (1) or (2) of this subsection is subject to medical dispute resolution pursuant to §133.307 of this title, notwithstanding the definition of medical fee dispute in §133.305 of this title (relating to MDR--General), and the health care insurer must follow the medical fee dispute resolution process allowed for a health care provider under that section, with any modifications specified by this subsection.

(C) Notwithstanding the requirements of §133.307(c)(2) of this title, a health care insurer shall only be required to include with a request for medical fee dispute resolution, a copy of the health care insurer reimbursement request as originally submitted to the workers' compensation insurance carrier, a copy of the EOB relevant to the fee dispute received from the workers' compensation insurance carrier, and sufficient information to substantiate the claim.

(D) A request for reconsideration is not required prior to a request for medical fee dispute resolution, notwithstanding the requirements for requesting medical fee dispute resolution under §133.307 of this title.

(E) A request for medical fee dispute resolution may be filed, notwithstanding the timeliness requirements for filing a request for medical fee dispute resolution under §133.307 of this title.

(i) Multiple Entities Seeking Reimbursement for Same Services. If there are multiple entities seeking reimbursement for the same services and dates of services for the same health care insurer for the same injured employee, the following apply:

(1) When the workers' compensation insurance carrier obtains a release from the health care insurer indicating that those specific services have been paid in full, no other entity may collect for those specific services.

(2) If a dispute remains over the fees to be paid for those specific services, the first in time to file a dispute with the Division is the only subclaimant that has a right to dispute resolution, and reimbursement, for that injured employee's claim and those specific services rendered unless that subclaimant abandons the dispute resolution process prior to a final adjudication of the issues.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804755

Stanton K. Strickland
Deputy Commissioner, Legal Services
Texas Department of Insurance, Division of Workers' Compensation
Effective date: September 23, 2008
Proposal publication date: April 25, 2008
For further information, please call: (512) 804-4715

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER P. DISHONORED PAYMENT DEVICE FEE

37 TAC §1.211

The Texas Department of Public Safety adopts amendments to §1.211, concerning Dishonored Payment Device Fee, without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5269).

Adoption of amendments to the section are necessary in order to change the subchapter and section title in order to address other types of payments, such as electronic. In addition, the section has been reformatted to add new subsection (a) which addresses electronic payments, and new subsection (c) which addresses how reimbursement payments are to be applied.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0135(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804744
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: September 23, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 424-2135

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CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER A. LICENSING REQUIREMENTS

37 TAC §15.1

The Texas Department of Public Safety adopts amendments to §15.1, concerning Who Must Be Licensed, without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5269).

On April 24, 2008, the Public Safety Commission adopted changes to 37 TAC §15.24 and §15.25. Those changes became effective May 20, 2008. Adoption of amendments to §15.1 is necessary in order to conform to the recent rule changes made in §15.24 and §15.25. In addition, the department proposes adding the term "personal identification certificate," to paragraph (2) so that the definition of resident is uniformly applied to applicants for a driver license and applicants for a personal identification certificate.

On July 15, 2008, the department held a public hearing to receive comments from all interested persons regarding adoption of the amendments. Mr. Kevin Cooper of US Custom Harvesters appeared at the hearing but provided no comments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804745
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: September 23, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 424-2135

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SUBCHAPTER K. SPECIAL PROVISIONS FOR NON-CITIZENS

37 TAC §15.171

The Texas Department of Public Safety adopts new Subchapter K, §15.171, concerning the issuance of driver licenses and identification certificates to non-citizens, without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5270).

The Public Safety Commission directed the Driver License Division to draft a rule requiring applicants who are not citizens or lawful permanent residents of the United States to present proof of their lawful status in order to obtain a Texas driver license or identification certificate. (For ease of reading, driver licenses and identification certificates are hereinafter collectively referred to as a "license" or "licenses.")

A state-issued driver license or identification certificate is a key link to public safety, privacy and national security. For the safety, security and peace of mind of its residents, Texas must produce a recognizably reliable source of identification in issuing licenses and, at the same time, reduce exposure to identity theft and fraud. Licenses are routinely used by the department, financial institutions, retailers, law enforcement, and other enti-

tles to establish a cardholder's identity. To protect the integrity of Texas licenses, the department believes it must make permanent changes that strengthen identity and residency requirements.

Adoption of the new section is necessary in order for the department to verify residency in the State, to enhance security and identity features of state-issued licenses, to address issues of fraud and misrepresentation in the application process and to help protect the integrity of Texas licenses for those who rely upon the licenses' authenticity.

In addition, adoption of the new section is necessary in order to provide the department the ability to require applicants with lawful status to present valid documentation demonstrating such lawful status and thus ensuring that licenses are issued only to applicants who are eligible for a Texas driver license or identification certificate. An individual with lawful temporary admission status of at least six months would be issued a license that displays the end date of the admission period authorized by the U.S. government. An individual who is not legally present in the United States because the individual has entered the country without permission or has stayed beyond the period authorized by federal authorities, or an individual whose lawful admission period is less than six months, will not be granted a license.

Further, adoption of the new section is necessary in order to require a cardholder whose lawful status has been updated or extended to present valid documentation of such status change or extension before a duplicate license will be issued. This in effect provides the department the ability to ensure that the cardholder is still eligible for and entitled to the license. The license will be cancelled if the cardholder is unable to present valid documentation that indicates federal approval to remain in the United States beyond the status date.

On July 15, 2008, the department held a public hearing to receive comments from all interested persons regarding adoption of the new section. Mr. Kevin Cooper of US Custom Harvesters appeared at the hearing but provided no comments.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.005, authorizing the department to adopt rules to administer the issuance of driver licenses and personal identification cards, including information required to be furnished by applicants.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 2008.

TRD-200804746
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: October 1, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 424-2135

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Medical Board

Title 22, Part 9

The Texas Medical Board proposes to review Chapter 165, Medical Records, §§165.1 - 165.6, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §165.1 and §165.5.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804791
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

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The Texas Medical Board proposes to review Chapter 169, Authority of Physicians to Supply Drugs, §§169.1 - 169.8, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §169.7.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804792
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

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The Texas Medical Board proposes to review Chapter 178, Complaints, §§178.1 - 178.8, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §178.1.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804793
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 179, Investigations, §§179.1 - 179.8, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §§179.1, 179.4, and 179.6.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804794
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 180, Rehabilitation Orders, §180.1, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §180.1.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804795
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 182, Use of Experts, §§182.1 - 182.8, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §§182.1, 182.5, and 182.8.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804796
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 187, Procedural Rules, §§187.1 - 187.11, 187.13 - 187.16, 187.18 - 187.31, 187.33, 187.35 - 187.39, 187.42 - 187.45, 187.55 - 187.62, 187.70 - 187.73, and 187.75 - 187.82, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §§187.3, 187.4, 187.13, 187.14, 187.18, 187.24, 187.29, 187.59, 187.70, 187.71, 187.72, and 187.73.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804797
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 190, Disciplinary Guidelines, §§190.1, 190.2, 190.8, and 190.14 - 190.16, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §§190.1, 190.8, and 190.14.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804798
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

♦ ♦ ♦

The Texas Medical Board proposes to review Chapter 192, Office Based Anesthesia Services, §§192.1 - 192.6, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposes amendments to §192.2.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200804799
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: September 8, 2008

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Adopted Rule Review

Texas Residential Construction Commission

Title 10, Part 7

In accordance with Texas Government Code §2001.039, the Texas Residential Construction Commission adopts the review of 10 TAC §§300.1 - 300.4, 300.12, and the repeal of §301.2 as a result of its rule review of Chapter 300.

Elsewhere in this issue of the *Texas Register,* the Texas Residential Construction Commission contemporaneously adopts the repeal of §301.2 and adopts the unchanged text of that rule into new §300.12, which relates to rulemaking procedures before the commission.

The proposed review was published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 5029). No written comments were received regarding proposed intention to review.

The agency's reasons for adopting §§300.1 - 300.4 continue to exist.

TRD-200804859
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: September 8, 2008

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §53.31(j)

AMFI	Rehabilitation or Reconstruction
≤30% AMFI	0% interest, 5-year deferred, forgivable Loan.
>30% and ≤50% AMFI	0% interest, 15-year deferred, forgivable Loan.
>50% and ≤60% AMFI	0% interest, 20-year deferred, forgivable Loan.
>60% and ≤80% AMFI	0% interest, 20-year term repayable Loan.

Figure: 10 TAC §53.85(a)(6)

OCC and HBA with Rehabilitation	Reconstruction	Rehabilitation
Project or Administrative Cost per ACTIVITY		
Application intake and processing	$ 600	$ 600
Credit Report	$ 50	$ 50
Construction and disbursement documentation preparation	$ 250	$ 250
Environmental review	$ 400	$ 400
Exempt administrative environmental	$ 50	$ 50
Final inspection	$ 300	$ 300
Information services	$ 200	$ 200
Initial inspection	$ 500	$ 500
Procurement of contractor	$ 300	$ 300
Progress inspections (up to 7 at $300 max each, minimum of 4 required)[1]	$ 2,100	$ 2,100
Pre-construction conference	$ 300	$ 300
Project document preparation	$ 100	$ 100
Punch list verification inspection	$ 300	$ 300
Schedule of values	$ 100	$ 100
Work write-up	N/A	$ 500[2]
Work write-up summary/cost estimate	$ 400[2]	$ 400[2]
Administrative Cost Only per CONTRACT		
Affirmative marketing plan	$ 200	$ 200
Financial management	$ 200	$ 200
Procurement of professional service provider	$ 300	$ 300
Recordkeeping	$ 800	$ 800
Project Cost Only per ACTIVITY or CONTRACT		
Plans (market value)	N/A	$ 200
Plans and specification manual (market value)	$ 2,000[2,3]	N/A
Specification manual	N/A	$ 200

[1] A maximum of two (2) progress inspections are allowed when a housing unit is replaced with an MHU.

[2] Work write-up, Work write-up summary/cost estimate, plans and specifications are not allowable costs when a housing unit is replaced with an MHU.

[3]Plans and specification manual is limited to $2,000 per Contract.

HBA	
Project or Administrative Cost per ACTIVITY	
Application intake and processing	$ 600
Preparation of loan documents	$ 100
Environmental Review	$ 400
Exempt administrative environmental	$ 50
Information services	$ 200
Project document preparation	$ 100
Property Inspection	$ 350
Schedule of values	$ 100
Administrative Cost Only per CONTRACT	
Affirmative marketing plan	$ 200
Financial management	$ 200
Procurement of professional service provider	$ 300
Recordkeeping	$ 800
Project Cost Only per ACTIVITY	
Credit Report	$ 50
Homebuyer Counseling	$ 300

Figure: 10 TAC §90.8(a)

APPENDIX A

Texas Department of Housing and Community Affairs
P. O. BOX 13941 Austin, Texas 78711-2489
(512) 475-4999 FAX (512) 475-0495
Pursuant to the Texas Migrant Labor Housing Facility Act, Tex. Gov. Code, §§2306.921-2306.933
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION TO OPERATE A MIGRANT LABOR HOUSING FACILITY

(Please type or print clearly.)

******Be Sure to Complete Both Pages of this Form******

Facility Location

Facility Name:			Facility Phone #:
Facility Location or Address:			
City:	State: TX	ZIP:	County:

Facility Description

Number of Buildings: _____ Number of Units: _____ Total Capacity: _____

Water Supply ☐ Municipal ☐ Private	Sewage Disposal ☐ Municipal ☐ Septic	Cooking Facility ☐ General Mess ☐ Individual
Bathing ☐ Central ☐ Individual	Laundry ☐ Central ☐ Individual	Hand washing ☐ Central ☐ Individual

Owner/Operator Contact Information

(Address where license will be mailed, *e.g.*, address of corporation, company, or home.)

Owner Name and/or Contact Person:		
Mailing Address:		
City:	State:	ZIP
Owner Phone #:		Owner Fax:

License Fee is $250

NOTE: All new applicants are required to pay the fee listed above, and will receive a license that, unless revoked, will expire after one (1) year.

APPENDIX A

	Reason For Applying (check all that apply)		
☐	New Facility	Opening Date:	
☐	License Renewal		TDHCA License #: MLF00000
☐	Change of Location	Previous Location:	TDHCA License #: MLF00000#:
☐	Change of Name	Previous Name:	TDHCA License #: MLF00000#:
☐	Change of Ownership	Previous Owner:	TDHCA License #: MLF00000#:

Certification Statement

Pursuant to the Texas Migrant Labor Housing Facility Act, Tex. Gov. Code, §§2306.921-2306.933 (the "Act"), I hereby have fully completed the above application, at least 45 days prior to the intended operation date, for a license to establish and maintain a Migrant Labor Housing Facility in accordance with rules promulgated by the Department of State Health Services, as they may apply to the administration of the Act by the Texas Department of Housing and Community Affairs (the "Department"). By signing this document I certify that I am an officer of the applicant or am otherwise authorized to sign this document on behalf of the applicant and that all information in this complete application is true and correct.

Signature:	Title:
Name (printed):	Date:

- An application must be submitted to the Department at least 45 days prior to the intended operation of the facility, but no more than 60 days prior.
- A license, unless revoked, shall expire one year from the date of issuance, and it shall be non transferable.
- Please note that it is the responsibility of the license holder to renew their license before the expiration date, whether or not they have received a payment notice from the Department. If you did not receive your renewal notice, you may use this form to renew your license.
- For assistance in completing this application, please call 512-475-4999.
- Make check payable to the: Texas Department of Housing and Community Affairs

Mail application and fees to the: TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
P.O. BOX 13941
AUSTIN, TX 78711-3941

*****Incomplete Applications or Improper Fees Will Delay License Issuance *****

Figure: 10 TAC §90.8(b)

APPENDIX B

Texas Department of Housing and Community Affairs
P. O. BOX 13981 Austin, Texas 78711-2489
Phone: 512-475-4999 or Fax: 512-475-0495
Pursuant to the Texas Migrant Labor Housing Facility Act, Tex. Gov. Code, §§2306.921-2306.933
Internet Address: http://www.tdhca.state.tx.us/migrant-housing/index.htm

LICENSE RENEWAL

APPLICATION TO OPERATE A MIGRANT LABOR HOUSING FACILITY

(Please type or print clearly.)

Facility Location			
Facility Name:			Facility Phone #:
Physical Location or Address of Facility:			
City:	State: TX	ZIP:	County:

Facility Description		
Number of Buildings: _____	Number of Units: _____	Total Capacity: _____
Water Supply	**Sewage Disposal**	**Cooking Facility**
☐ Municipal	☐ Municipal	☐ General Mess
☐ Private	☐ Septic	☐ Individual
Bathing	**Laundry**	**Hand washing**
☐ Central	☐ Central	☐ Central
☐ Individual	☐ Individual	☐ Individual

Owner/Operator Contact Information (Address where license will be mailed, *e.g.*, address of corporation, company, or home.)		
Owner Name and/or Contact Person:		
Mailing Address:		
City:	State: TX	ZIP:
Owner Phone #:		Owner Fax:

License Fee is $250

NOTE: All applicants are required to pay the fee listed above, and will receive a license that, unless revoked, will expire after one (1) year.

APPENDIX B

	Reason For Applying (check all that apply)	
☐ New Facility	Opening Date:	
☐ License Renewal		TDHCA License #: MLF00000
☐ Change of Location	Previous Location:	TDHCA License #: MLF00000
☐ Change of Name	Previous Name:	TDHCA License #: MLF00000
☐ Change of Ownership	Previous Owner:	TDHCA License #: MLF00000

Certification Statement

Pursuant to the Texas Migrant Labor Housing Facility Act, Tex. Gov. Code, §§2306.921-2306.933 (the "Act"), I hereby have fully completed the above application, at least 45 days prior to the intended operation date, for a license to establish and maintain a Migrant Labor Housing Facility in accordance with rules promulgated by the Department of State Health Services, as they may apply to the administration of the Act by the Texas Department of Housing and Community Affairs (the "Department"). By signing this document I certify that I am an officer of the applicant or am otherwise authorized to sign this document on behalf of the applicant and that all information in this complete application is true and correct.

Signature:	Title:
Name (printed):	Date:

- An application must be submitted to the Department at least 45 days prior to the intended operation of the facility, but no more than 60 days prior.
- A license, unless revoked, shall expire one year from the date of issuance, and it shall be non transferable.
- Please note that it is the responsibility of the license holder to renew their license before the expiration date, whether or not they have received a payment notice from the Department. If you did not receive your renewal notice, you may use this form to renew your license.
- For assistance in completing this application, please call 512-475-4999.
- Make check payable to the: Texas Department of Housing and Community Affairs

Mail application and fees to the: TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
P.O. BOX 13981
AUSTIN, TX 78711-2489

*****Incomplete Applications or Improper Fees Will Delay License Issuance *****

Figure: 10 TAC §90.8(c)

APPENDIX C

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
4413 82nd Street Lubbock, TX 79424
Phone 806-794-2105 Fax 806-794-6876

REPORT OF INSPECTION
MIGRANT LABOR HOUSING FACILITY

Facility Information

Name of Facility: _____ License number if licensed: ***MLF00000***

Physical Address: _____ # of bldgs: _____ # of units: _____

City/State/ZIP: _____ Total Capacity: _____

Date of inspection: _____ Inspector: _____

Name of license holder's representative present: _____

Inspection Information

Purpose of inspection: ☐ New license ☐ Renewal ☐ Routine ☐ Complaint

Facility Inspection: ☐ Passed ☐ Failed

References to rule sections are to 10 TAC Chapter 90. For full, exact text of the section cited, see the rules, which may be accessed on the TDHCA website at: *http://www.tdhca.state.tx.us/migrant-housing/index.htm*

	OK	Dev	Comment
Facility Site	☐	☐	
1. Section 90.2(a)(1) Site must be well-drained, free from depressions in which water mat stand. Natural sinkholes, pools, swamps or other surface collectors of water within 200 feet must be drained.	☐	☐	
2. Section 90.2(a)(2) Site free from odors, flies, noise, traffic, fire, threats to safety, flooding, overcrowding, or similar hazards.	☐	☐	
3. Section 90.2(a)(3) Site free from debris/noxious plants, uncontrolled weeds or brush.	☐	☐	
4. Section 90.2(a)(4) Adequate recreational space provided.	☐	☐	
5. Section 90.2(a)(5) No livestock feeding pens within 500 feet.	☐	☐	
6. Section 90.2(a)(6) Site not subject to periodic flooding or located so that drainage from and through site would endanger water supply.	☐	☐	

	OK	Dev	Comment
Water Supply	☐	☐	
7. Section 90.2(b)(1) Water supply must meet standards.	☐	☐	
8. Section 90.2(b)(2) If water supply does not meet standards, notices must be posted and bottled water must be provided.	☐	☐	
9. Section 90.2(b)(3) Facility must be connected to public water if possible.	☐	☐	
10. Section 90.2(b)(4) Adequate arrangements for hot water for bathing, laundry, cooking, and dishwashing in all facility sites.	☐	☐	
11. Section 90.2(b)(5) Water pressure at least 20 psi and minimum static of 35 psi for each living arrangement and utility building.	☐	☐	
12. Section 90.2(b)(6) Adequate drinking fountains in common areas and dining facilities.	☐	☐	
13. Section 90.2(b)(7) Each sink should provide hot and cold water through a single faucet that enables hot and cold water to be mixed to adjust the temperature.	☐	☐	
Waste Disposal/Sanitation	☐	☐	
14. Section 90.2(c)(1) Effective sewage disposal. No sewage on surface.	☐	☐	
15. Section 90.2(c)(2) Connected to sewer systems, if available.	☐	☐	
16. Section 90.2(c)(3) All other disposal systems (septic, portable toilets, etc.) conform to Texas Department of State Health Services Standards.	☐	☐	
17. Section 90.2(c)(4) Portable toilets not mechanically ventilated have adequate screened ventilation openings.	☐	☐	
Facilities	☐	☐	
18. Section 90.2(d)(1) Constructed to protect from the elements. Good repair and sanitary conditions. **Each unit shall have a smoke detector.**	☐	☐	
19. Section 90.2(d)(2) Smooth, rigid, readily cleanable flooring. Ground water cannot enter.	☐	☐	
20. Section 90.2(d)(3) Combined cooking/eating, sleeping arrangements have at 100 SF per person for 18 months and over; sleeping facilities have at least 50 SF per person.	☐	☐	
21. Section 90.2(d)(4) Facilities for families with children have a separate room or partitioned area for husband and wife.	☐	☐	
22. Section 90.2(d)(5) Dormitory facilities are separated for each sex. Family housing units have separate accommodations by family.	☐	☐	
23. Section 90.2(d)(6) Adequate separate places for each person to hang clothes and store personal effects for each person.	☐	☐	
24. Section 90.2(d)(7) Minimum ceiling height is 7ft.	☐	☐	
25. Section 90.2(d)(8) Each habitable room must have window or skylight to the outside.	☐	☐	
26. Section 90.2(d)(9) No areas used for housing were previously used for mixing, loading, or storing toxic substances.	☐	☐	
Cooking and Eating	☐	☐	
27. Section 90.2(e)(1) Arrangements are adequate - Family.	☐	☐	
28. Section 90.2(e)(2) Arrangements are adequate - Dormitory.	☐	☐	
29. Section 90.2(e)(3) Central mess/Multi-family operations meet standards.	☐	☐	
Sleeping Arrangements	☐	☐	
30. Section 90.2(f)(1) Sleeping arrangements in good repair and sanitary condition.	☐	☐	
31. Section 90.2(f)(2) Mattresses and covers sanitized when user changes.	☐	☐	
32 Section 90.2(f)(3) Sleeping arrangements adequately spaced.	☐	☐	

	OK	Dev	Comment
Heating	☐	☐	
33. Section 90.2(g)(1) Installed, operable, maintains at least 68 degrees.	☐	☐	
34. Section 90.2(g)(2) Failsafe if power or fuel is interrupted.	☐	☐	
35. Section 90.2(g)(3) Walls/ceilings provided with fire proof materials, 18" around stove/pipes.	☐	☐	
36. Section 90.2(g)(4) Stoves and heat sources using combustible fuel installed to prevent fire Vented through ceiling, wall, or roof.	☐	☐	
37. Section 90.2(g)(5) Stoves and heat sources using combustible fuel must be vented. Must extend beyond peak of roof.	☐	☐	
38. Section 90.2(g)(6) Solid or liquid fuel stoves in a room with wooden or combustible flooring must be fireproofed 18" beyond the stove.	☐	☐	
39. Section 90.2(g)(7) No portable heaters other than electric.	☐	☐	
Bathrooms and Laundry Rooms	☐	☐	
40. Section 90.2(h)(1) Bathrooms separate to assure privacy.	☐	☐	
41. Section 90.2(h)(2) Tubs, showers, and sinks within 200' of each living arrangement.	☐	☐	
42. Section 90.2(h)(3) Bathrooms and laundry rooms conducive to good repair and maintained in a sanitary condition.	☐	☐	
43. Section 90.2(h)(4) Shower floors non-absorbent, non-skid, properly draining.	☐	☐	
44. Section 90.2(h)(5) Communal bathrooms Separate bathing/washing and dressing spaces. Designated as men/women.	☐	☐	
45. Section 90.2(h)(6) Communal bathrooms showerhead 3' apart per 10 persons and one lavatory sink per 6 people, 9 sf per shower.	☐	☐	
46. Section 90.2(h)(7) Separate shower stalls in communal bathrooms.	☐	☐	
47. Section 90.2(h)(8) One mechanical clothes washer per 50 occupants, one laundry tray per 100 persons, or one laundry tray or tub per 25 persons.	☐	☐	
48. Section 90.2(h)(9) Clothes drying arrangements.	☐	☐	
Toilets	☐	☐	
49. Section 90.2(i)(1) Within 200 feet of each living arrangement.	☐	☐	
50. Section 90.2(i)(2) Conducive to good repair; maintained in sanitary condition; "fly proof" and adequate capacity.	☐	☐	
51. Section 90.2(i)(3) Communal toilets separated by sex by solid floor to ceiling wall; labeled by sex in English or universal symbol.	☐	☐	
52. Section 90.2(i)(4) Communal toilets lighted naturally or by safe artificial light. Well ventilated, screened with mesh.	☐	☐	
53. Section 90.2(i)(5) Water closed or privy seats 1:1 of each sex. At least one per sex.	☐	☐	
54. Section 90.2(i)(6) Urinals in lieu of toilets for up to 1/3 of men's seats.	☐	☐	
55. Section 90.2(i)(7) Urinals and surrounding walls of nonabsorbent material.	☐	☐	
Garbage/Refuse	☐	☐	
56. Section 90.2(j)(1) Containers conveniently located/ adequate number.	☐	☐	
57. Section 90.2(j)(2) Containers must be in good repair and sanitary.	☐	☐	
58. Section 90.2(j)(3) Must be collected at twice per week.	☐	☐	

	OK	Dev	Comment
Electricity/Lighting	☐	☐	
59. Section 90.2(k)(1) All facilities shall be provided electricity.	☐	☐	
60. Section 90.2(k)(2) Each habitable room must have a ceiling or wall light and an outlet.	☐	☐	
61. Section 90.2(k)(3) Yard areas and pathways to communal arrangements to be illuminated.	☐	☐	
62. Section 90.2(k)(4) Wiring and fixtures to be to National Electric Code and state and local codes.	☐	☐	
63. Section 90.2(k)(5) Toilets and storage rooms - 20 foot light candles 30 inches from floor, other rooms 30 foot candles 30 inches from floor.	☐	☐	
Screening	☐	☐	
64. Section 90.2(l)(1) Outside openings 16 mesh or less.	☐	☐	
65. Section 90.2(l)(2) Screen doors tight and self-closing.	☐	☐	
66. Section 90.2(l)(3) Screens maintained in good repair.	☐	☐	
Insect and Rodent Control	☐	☐	
67. Section 90.2(m)(1) Housing sites, units, and utility areas constructed to exclude insects, rodents or other vermin.	☐	☐	
68. Section 90.2(m)(2) Vector control program maintained to insure effective control of insects, rodents and other vermin.	☐	☐	
69. Section 90.2(m)(3) All vector control programs provide max. protection.	☐	☐	
Fire, First Aid, and Safety	☐	☐	
70. Section 90.2(n)(1) All buildings shall be maintained and used in accordance with the provisions of state and local regulations.	☐	☐	
71. Section 90.2(n)(2) Building provides adequate fire exits.	☐	☐	
72. Section 90.2(n)(3) Communal facilities provide adequate fire exits.	☐	☐	
73. Section 90.2(n)(4) Sleeping quarters and assembly rooms on second story shall have a stairway plus permanent affixed ladder or stairway.	☐	☐	
74. Section 90.2(n)(5) Fire extinguishing equipment within 100 feet of each facility.	☐	☐	
75. Section 90.2(n)(6) 1st aid kits provided and accessible at all times. 1 per 16 unit 1 per 50 persons.	☐	☐	
76. Section 90.2(n)(7) No flammable or volatile liquids or materials stored in or adjacent to rooms used for living.	☐	☐	
77. Section 90.2(n)(8) No ag pesticides or toxic chemicals stored within facility site. 500 feet in secured location.	☐	☐	
78. Section 90.3(g) Inspection shall cover all units that are subject to being occupied.	☐	☐	

Other inspector comments:

Figure: 19 TAC §5.9

GPA	Percentile	Letter Grade	AP/IB/Dual Credit
4.0	95-100	A	5.0
3.9	94	A	4.9
3.8	93	A	4.8
3.7	92	A -	4.7
3.6	91	A -	4.6
3.5	90	A -	4.5
3.4	89	B +	4.4
3.3	88	B +	4.3
3.2	87	B +	4.2
3.1	86	B	4.1
3.0	85	B	4.0
2.9	84	B	3.9
2.8	83	B	3.8
2.7	82	B -	3.7
2.6	81	B -	3.6
2.5	80	B -	3.5
2.4	79	C +	3.4
2.3	78	C +	3.3
2.2	77	C +	3.2
2.1	76	C	3.1
2.0	75	C	3.0
1.9	74	C	2.9
1.8	73	C	2.8
1.7	72	C -	2.7
1.6	71	C -	2.6
1.5	70	C -	2.5
1.4	69	D +	0
1.3	68	D +	0
1.2	67	D +	0
1.1	66	D	0
1.0	65	D	0
0.9	64	D	0
0.8	63	D	0
0.7	62	D -	0
0.6	61	D -	0
0.5	60	D -	0

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following projects during the period of August 29, 2008, through September 4, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council's web site. The notice was published on the web site on September 10, 2008. The public comment period for this project will close at 5:00 p.m. on October 10, 2008.

FEDERAL AGENCY ACTIONS: Applicant: Robert Wardlaw Location: The project is located along the Gulf Intracoastal Waterway, at 135 Shark Lane, in the City of Surfside, Brazoria County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Freeport, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 276629; Northing: 3205121. Project Description: The applicant proposes to remove an existing bulkhead, install a new bulkhead, construct piers, install a concrete pad, and fill 1.34 acres of adjacent wetlands and dredge 0.6 acres for a full service marina with dry stack boat storage. The applicant also proposes to mitigate on 3 acres offsite located along Farm-to-Market 2918 in the City of Brazoria, Texas. The proposed mitigation will consist of converting 1.34 acres of uplands into wetland. CCC Project No.: 08-0217-F1 Type of Application: U.S.A.C.E. permit application #SWG-2003-01487 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Brazos River Harbor Navigation District Location: The project is located on the west end of the Brazos Harbor, which is located on the southeast side of the City of Freeport, in Brazoria County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Freeport, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 271650; Northing: 3203216. Project Description: The applicant requests that Permit SWG-2007-00768, issued in March of 2008, be modified to allow an additional 125 feet of wharf extension and an additional 1.33-acre enlargement of the Brazos River Harbor. CCC Project No.: 08-0218-F1 Type of Application: U.S.A.C.E. permit application #SWG-2007-00768 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Martin Operating Partnership, LP Location: The project sites are located along the south shoreline of Pelican Island on the north side of the Galveston Harbor Channel, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 326724.96; Northing: 3245127.69. Project Description: The applicant requests authorization for a 10-year maintenance dredging permit. Dredging would be done mechanically or by suction from, and in front of, two marine slips. Maintenance dredging would be done to a depth of minus 23 feet deep at mean low tide with a 2-foot over-draft allowed. CCC Project No.: 08-0217-F1 Type of Application: U.S.A.C.E. permit application #SWG-2003-01487 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Petro-Guard Company, Inc. Location: The project is located in Espiritu Santo Bay, State Tract (ST) 224, in Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: TX-Pass Cavallo SW, Texas, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 747650.90; Northing: 3138821.31. Project Description: The applicant proposes to drill in ST 224 for petroleum resources, place structures, install approximately 5,271 feet of pipeline, and replace approximately 4,314 feet of existing pipeline. The pipeline would be jetted or plowed a minimum distance of 3 feet below the bay bottom. No wetlands, seagrass, or oysters would be impacted. CCC Project No.: 08-0231-F1 Type of Application: U.S.A.C.E. permit application #SWG-2007-01972 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: U.S. Army Corps of Engineers Location: Waters of the United States within a portion of the High Island Oil Field, bounded on the south and west by the existing perimeter levee, on the north by a marsh adjacent to the perimeter levee, and on the east by State Highway 124 and the 5-foot elevation contour, at the base of High Island, Galveston County, Texas. Project Description: The Galveston District proposes to re-issue the Regional General Permit (RGP) authorizing the construction of access roads, drilling site location pads and production site pads, including excavation and levee construction, within the High Island Oil Field. The RGP was previously authorized as 15208/(04). CCC Project No.: 08-0236-F2 Type of Application: U.S.A.C.E. permit application #SWG-1997-02818 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873,

or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax to (512) 475-0680.

TRD-200804908
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: September 9, 2008

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Contract Award

The Comptroller of Public Accounts (Comptroller) announces the following contract award:

The notice of request for proposals (RFP #184c) was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3669).

The contractor will provide outside counsel services to the Comptroller and the Texas Prepaid Higher Education Tuition Board.

The contract was awarded to Clark, Thomas & Winters PC. The total amount of the contract is not to exceed $150,000.00. The term of the contract is September 1, 2008 through August 31, 2009.

TRD-200804764
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 4, 2008

♦ ♦ ♦

Notice of Contract Award

The Comptroller of Public Accounts (Comptroller) announces the following contract award:

The notice of request for proposals (RFP #185a) was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3670).

The contractor will provide investment consulting services to the Comptroller and the Texas Prepaid Higher Education Tuition Board.

The contract was awarded to Ennis, Knupp & Associates, Inc., 10 South Riverside Plaza, Suite 1600, Chicago, Illinois 60606. The total amount of the contract is not to exceed $150,000.00. The term of the contract is August 27, 2008 through August 31, 2010, with option to renew for up to two (2) additional one (1) year periods, one (1) year at a time.

TRD-200804765
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 4, 2008

♦ ♦ ♦

Notice of Contract Award

The Comptroller of Public Accounts (Comptroller) announces the following contract award:

The notice of request for proposals (RFP #185b) was published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4206).

The contractor will provide large capital value domestic equity investment consulting services to the Comptroller and the Texas Prepaid Higher Education Tuition Board.

The contract was awarded to Westwood Management Corporation, 200 Crescent Court, Suite 1200, Dallas, Texas 75201. The total amount of the contract is based on a percentage of total assets under management. The term of the contract is August 27, 2008 through August 31, 2013, with option to renew for up to two (2) additional one (1) year periods, one (1) year at a time.

TRD-200804766
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 4, 2008

♦ ♦ ♦

Notice of Public Hearing for Claims Processing and State Procurement and Support Services Proposed Rules

The Office of the Comptroller of Public Accounts will hold a public hearing regarding proposed Claims Processing and State Procurement and Support Services rules §§5.51, 5.54, 5.57, 20.34, and 20.48 on Wednesday, October 1, 2008, at 2:00 p.m. in Room 114 of the LBJ State Office Building, 111 E. 17th Street, Austin, Texas 78711-1440. The proposed rules were published in the June 13, 2008 (§§5.51, 5.54, 5.57, and 20.48) and August 1, 2008 (§20.34) issues of the *Texas Register*.

The purpose of this hearing is to receive comments from interested persons, pursuant to Texas Government Code, §2001.029. Pursuant to Texas Government Code, §2155.0012, a public hearing will be conducted for rules adopted under Texas Government Code, Chapter 2155. Questions concerning the public hearing or this notice should be referred to Whitney Blanton, Special Counsel to the Deputy Comptroller. Phone Number: (512) 463-7363. E-mail address: whitney.blanton@cpa.state.tx.us. Fax Number: (512) 305-9907.

NOTICE FOR PERSONS WITH DISABILITIES

Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, also non-English speaking persons who may need assistance are requested to contact Ms. Valerie Simpson, 1-800-531-5441, Extension 3-3562, at least two (2) working days prior to the hearing so that appropriate arrangements may be made.

TRD-200804911
Martin Cherry
General Counsel
Comptroller of Public Accounts
Filed: September 10, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/15/08 - 09/21/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/15/08 - 09/21/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200804762
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 3, 2008

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Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 09/15/08 - 09/21/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 09/15/08 - 09/21/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200804874
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 9, 2008

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East Texas Council of Governments

Request for Proposals

The East Texas Council of Governments (ETCOG), a political subdivision of the State of Texas, is soliciting proposals for banking services. The contract period is anticipated to begin December 1, 2008 to extend through September 30, 2011 with the availability of two one year additional options.

ETCOG will consider banking institutions or branches within close proximity of Kilgore, Texas or within a 35 mile radius.

Requests for Proposals will not be released prior to September 3, 2008. The anticipated deadline for receipt of proposals will be October 3, 2008.

Persons or organizations wanting to receive a Request for Proposals (RFP) package should request letter, email or by fax. Request letters should be addressed to Judy Durland, Director of Finance, East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas 75662 or email to Judy.Durland@twc.state.tx.us or fax at (903) 983-1440, attention Judy Durland.

Questions concerning the RFP process should be addressed by email or fax to Judy Durland, Director of Finance, Judy.Durland@twc.state.tx.us or Elizabeth.Jones@twc.state.tx.us or fax at (903) 983-1440.

TRD-200804760
David A. Cleveland
Executive Director
East Texas Council of Governments
Filed: September 3, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 20, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 20, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: ANH P. BROWN CORPORATION dba The Convenient Store; DOCKET NUMBER: 2008-0739-MLM-E; IDENTIFIER: RN101496289; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §213.5(d)(1), by failing to provide a functioning continuous monitoring leak detection system; 30 TAC §115.222(6) and Texas Health and Safety Code (THSC), §382.085(b), by failing to ensure that each vapor balance system vent line is equipped with a pressure-vacuum relief valve; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; PENALTY: $12,500; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(2) COMPANY: Brownfield Farmers, L.L.C.; DOCKET NUMBER: 2008-0582-AIR-E; IDENTIFIER: RN104320023; LOCATION: Seagraves, Gaines County; TYPE OF FACILITY: portable fertilizer blending plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 72361L002, Special Condition (SC) Number 4, and THSC, §382.085(b), by failing to adhere to the permitted annual fertilizer production rate of the portable pipe reactor; 30 TAC §116.115(c), Air Permit Number 72361L002, SC Number 5, and THSC, §382.085(b), by failing to adhere to the operational time limits of the portable pipe reactor; 30 TAC §116.115(c), Air Permit Number 72361L002, SC Number 7, and THSC, §382.085(b), by failing to perform stack testing; and 30 TAC §116.115(c), Air Permit Number 72361L002, SC Numbers 11, 12, and 13, and THSC, §382.085(b), by failing to

submit letters requesting TCEQ approval prior to moving the portable pipe reactor; PENALTY: $9,000; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(3) COMPANY: Certainteed Corporation; DOCKET NUMBER: 2008-0956-AIR-E; IDENTIFIER: RN100671619; LOCATION: Sherman, Grayson County; TYPE OF FACILITY: fiberglass manufacturing plant; RULE VIOLATED: 30 TAC §122.146(2), Federal Operating Permit (FOP) Number O-02638 General Terms and Conditions (GTC), and THSC, §382.085(b), by failing to submit an annual permit compliance certification; PENALTY: $1,925; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Clearstream Wastewater Systems, Incorporated; DOCKET NUMBER: 2008-0930-AIR-E; IDENTIFIER: RN100214659; LOCATION: Silsbee, Hardin County; TYPE OF FACILITY: septic tank manufacturing plant; RULE VIOLATED: 30 TAC §§116.115(c), 122.143(4), 122.145(2)(A), and 122.146(5)(D), FOP Number 1796, GTC, Air Permit Number 26245, General Condition 10, and THSC, §382.085(b), by failing to timely submit two deviation reports and failing to properly certify a corresponding annual compliance certification (ACC); PENALTY: $4,750; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: City of Coolidge; DOCKET NUMBER: 2008-0764-PWS-E; IDENTIFIER: RN101402485; LOCATION: Coolidge, Limestone County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(c)(4)(B), by failing to monitor the disinfectant residual; 30 TAC §290.46(q)(1) and (2) and §290.122(a)(2), by failing to issue a boil water notification to customers; 30 TAC §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a chloramine residual of at least 0.5 milligrams per liter; 30 TAC §290.46(e)(3)(B) and THSC, §341.033(a), by failing to operate the system under the direct supervision of a water works operator who holds a Class "C" or higher license; 30 TAC §290.42(l), by failing to compile and maintain a thorough and up-to-date plant operations manual for operator review and reference; 30 TAC §290.46(f)(2) and (3)(E)(iv), by failing to maintain copies of customer service inspection reports and make those reports available to commission personnel; 30 TAC §290.46(i), by failing to adopt an adequate plumbing ordinance or service agreement designed to ensure that neither cross-connections nor unacceptable plumbing practices are permitted; 30 TAC §290.46(t), by failing to post legible signs at the water system that include the name of the water system and an emergency telephone number; and 30 TAC §290.43(c)(3), by failing to provide the elevated storage tank with an overflow pipe flap valve assembly; PENALTY: $3,201; ENFORCEMENT COORDINATOR: Christopher Keffer, (512) 239-5610; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: Custom Water Company, L.L.C.; DOCKET NUMBER: 2008-0417-PWS-E; IDENTIFIER: RN101260115; LOCATION: Montague County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(2) and (3), by failing to develop and maintain records of water work operations and maintenance activities; 30 TAC §290.43(c)(2) and (8), by failing to provide a ground storage tank that meets American Water Works Association standards; 30 TAC §290.110(e)(4), by failing to submit disinfection level quarterly operating reports; and 30 TAC §290.43(e), by failing to provide a properly constructed intruder-resistant fence around two ground storage tanks; PENALTY: $3,737; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(7) COMPANY: East Cedar Creek Fresh Water Supply District; DOCKET NUMBER: 2008-0786-MWD-E; IDENTIFIER: RN102185352; LOCATION: Gun Barrel City, Henderson County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0011858001, Interim I & II Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total phosphorus, dissolved oxygen (DO), ammonia-nitrogen (NH_3N), and flow; PENALTY: $5,370; Supplemental Environmental Project (SEP) offset amount of $4,296 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: Enterprise Products Operating LLC; DOCKET NUMBER: 2007-1162-AIR-E; IDENTIFIER: RN102323268; LOCATION: Mont Belvieu, Chambers County; TYPE OF FACILITY: natural gas liquids processing plant; RULE VIOLATED: 30 TAC §116.116(a)(1) and (b)(1)(C), New Source Review (NSR) Permit Number 8707 Application Representations, and THSC, §382.085(b), by failing to maintain an emission rate below permit application representations of 1.12 pounds per hour (lbs/hr) of volatile organic compounds (VOCs); 30 TAC §116.116(a)(1) and (b)(1)(C), NSR Permit Number 6798 Application Representations, and THSC, §382.085(b), by failing to maintain an emission rate below permit application representations of 1.61 lbs/hr of VOCs; and 30 TAC §116.115(c) and §116.116(a)(1) and (b)(1)(C), NSR Permit Number 5581 Application Representations and SC Number 1, and THSC, §382.085(b), by failing to maintain an emission rate below permitted limits of 0.13 lbs/hr; PENALTY: $541,450; SEP offset amount of $270,725 applied to Barbers Hill Independent School District - Energy Efficiency Program; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: Firestone Polymers, LLC; DOCKET NUMBER: 2007-1598-AIR-E; IDENTIFIER: RN100224468; LOCATION: Orange, Orange County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(2), 113.260, 116.715(a), and 122.143(4), NSR Flexible Air Permit Number 292, SC Number 4.E., FOP O-01271, GTC and Special Terms and Conditions (STC) 10, 40 Code of Federal Regulations (CFR) §63.167 and §63.502(a), and THSC, §382.085(b), by failing to cap seven open-ended lines and to properly seal 69 leaking open-ended lines in VOC service; 30 TAC §§101.20(2), 113.260, and 122.143(4), 40 CFR §63.502(n), and THSC, §382.085(b), by failing to monitor Cooling Tower DK-801 on a quarterly basis using United States Environmental Protection Agency (EPA) Method 624; 30 TAC §§106.454(3)(B), 115.412(1)(A), and 122.143(4), FOP Number O-01271, GTC and STC 10, and THSC, §382.085(b), by failing to maintain closed lids on degreasers; 30 TAC §§113.260, 116.715(a), and 122.143(4), NSR Flexible Air Permit Number 292, SC Number 15, FOP O-01271, GTC and STC 10, and THSC, §382.085(b), by failing to conduct residual VOC sampling; 30 TAC §113.260 and §122.143(4), FOP Number O-01271, STC and STC 10, 40 CFR §63.506(e)(5), and THSC, §382.085(b), by failing to submit a notification of compliance status report; 30 TAC §§101.20(2), 113.260, and 122.143(4), FOP Number O-01271, GTC and STC 1.D., 40 CFR §63.494(a)(2), and THSC, §382.085(b), by failing to demonstrate compliance with the residual organic hazardous air pollutant limitations; 30 TAC §116.715(a) and §122.143(4), NSR Flexible Air Permit 292, SC Number 7.B., FOP Number O-01271,

GTC and STC 10, and THSC, §382.085(b), by failing to properly monitor Cooling Tower DK-801; 30 TAC §122.143(4), FOP Number O-01271, GTC and SC Number 3.B.(iii.), and THSC, §382.085(b), by failing to perform annual opacity observations of all stationary vents; and 30 TAC §§122.143(4), 122.145(2)(A), 122.146(1), and 122.146(5)(C)(v) and (D), FOP Number O-01386, GTC, and THSC, §382.085(b), by failing to report the occurrence of deviations in semi-annual deviation reports and to accurately certify compliance in an ACC; PENALTY: $66,871; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: Kenneth Louis Gillispie; DOCKET NUMBER: 2008-1325-OSI-E; IDENTIFIER: RN103299715; LOCATION: Crandall, Kaufman County; TYPE OF FACILITY: on-site sewage installer; RULE VIOLATED: 30 TAC §285.61(4), by failing to ensure that an authorization to construct has been issued prior to beginning construction of an on-site sewage facility; PENALTY: $175; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Lyle Murphey dba Highway 71 Storage & Mobile Home Park; DOCKET NUMBER: 2008-1006-PWS-E; IDENTIFIER: RN101250322; LOCATION: Travis County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the consumer confidence report (CRR) to each bill paying customer and by failing to submit a copy of the annual CRR and certification that the CCR has been distributed to the customers of the water system and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $1,015; ENFORCEMENT COORDINATOR: Christopher Keffer, (512) 239-5610; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(12) COMPANY: Holy Trinity Episcopal School of Greater Houston, Inc.; DOCKET NUMBER: 2008-0706-MWD-E; IDENTIFIER: RN102855384; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a)(1), by failing to maintain authorization for the discharge of wastewater; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(13) COMPANY: INEOS USA LLC; DOCKET NUMBER: 2008-0800-AIR-E; IDENTIFIER: RN100238708; LOCATION: Alvin, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 111.111(a)(1), and 116.715(a), NSR Flexible Air Permit Number 95/PSD-TX-854, General Condition Number 11 and SC Number 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits; PENALTY: $17,400; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: Kenedy Manor Nursing Homes, Inc.; DOCKET NUMBER: 2008-0741-PWS-E; IDENTIFIER: RN101205276; LOCATION: Kenedy, Karnes County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(3)(A)(ii)(III), by failing to provide the water system's operating records for commission review during inspections; 30 TAC §290.45(d)(2)(B)(ii) and THSC, §341.0315(c), by failing to provide ground storage capacity equal to 50% of the maximum daily demand; 30 TAC §290.45(d)(2)(B)(iv) and THSC, §341.0315(c), by failing to provide at least two service pumps with a total capacity of three times the maximum daily demand; and 30 TAC §290.121(a) and (b), by failing to have a complete and up-to-date chemical and microbiological monitoring plan; PENALTY: $873; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(15) COMPANY: L H Lacy Company Ltd; DOCKET NUMBER: 2008-1337-WQ-E; IDENTIFIER: RN105457576; LOCATION: Collin County; TYPE OF FACILITY: storm water; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Montgomery County Municipal Utility District Number 24; DOCKET NUMBER: 2008-0896-MWD-E; IDENTIFIER: RN103124236; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014116001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for NH_3N; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: City of Oakwood; DOCKET NUMBER: 2007-0447-MWD-E; IDENTIFIER: RN102075553; LOCATION: Oakwood, Leon County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10586002, Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, and the Code, §26.121(a), by failing to comply with permit effluent limits for DO, biochemical oxygen demand (BOD), pH, and total suspended solids (TSS); 30 TAC §305.125(17) and TPDES Permit Number 10586002, Sludge Provisions, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(17) and TPDES Permit Number 10586002, Effluent Limitations and Monitoring Requirements Number 1, by failing to submit the discharge monitoring report parameter data for the maximum single grab BOD; PENALTY: $15,402; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(18) COMPANY: Penske Truck Leasing Company, L.P.; DOCKET NUMBER: 2008-0570-PST-E; IDENTIFIER: RN102048949; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: truck rental and refueling; RULE VIOLATED: 30 TAC §334.55(a)(5), by failing to dispose of contaminated groundwater at an authorized facility; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(19) COMPANY: Brijinder Mohan dba S S Mart; DOCKET NUMBER: 2008-0543-PST-E; IDENTIFIER: RN101543270; LOCATION: Denison, Grayson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the agency for any change or additional information regarding the USTs; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; 30 TAC §334.45(e)(2)(D), by failing to equip

all fill pipes in a new UST system with a removable or permanent factory-constructed drop tube; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; and 30 TAC §334.50(d)(1)(B)(iii)(II) and the Code, §26.3475(c)(1), by failing to have an accurate means of measuring the level of stored substance; PENALTY: $8,670; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: S Fiberglass, Ltd.; DOCKET NUMBER: 2008-0484-AIR-E; IDENTIFIER: RN100212893; LOCATION: Bridgeport, Wise County; TYPE OF FACILITY: fiberglass products manufacturing plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to certify compliance with FOP Number O-02659; PENALTY: $2,375; SEP offset amount of $950 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Shell Chemical LP and Equilon Enterprises LLC; DOCKET NUMBER: 2008-0701-IWD-E; IDENTIFIER: RN100209832; LOCATION: Harris County; TYPE OF FACILITY: petrochemical research center with wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0001853000, and the Code, §26.121(a), by failing to comply with permitted limits for TSS, oil and grease, and NH_3N; PENALTY: $4,830; SEP offset amount of $1,932 applied to Gulf Coast Waste Disposal Authority ("GCWDA") - River, Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: Thelma Hall dba Thelma Hall Dairy; DOCKET NUMBER: 2008-0931-AGR-E; IDENTIFIER: RN102792546; LOCATION: Franklin County; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.31(a) and the Code, §26.121(a)(1), by failing to prevent and contain a discharge of waste and/or wastewater; 30 TAC §321.47(d)(6), by failing to maintain an adequate buffer between a private well and the holding pen; 30 TAC §321.47(e)(2), by failing to restore the retention control structure (RCS) storage capacity; 30 TAC §321.47(f)(12), by failing to maintain vegetative buffer strips; and 30 TAC §321.47(f)(19)(A), by failing to restrict animals at the facility from coming into direct contact with surface water; PENALTY: $23,400; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(23) COMPANY: Dorothy A. Thompson; DOCKET NUMBER: 2008-1333-WOC-E; IDENTIFIER: RN103749768; LOCATION: Gregg County; TYPE OF FACILITY: water operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(24) COMPANY: Thurman Woodle Investments, LLC; DOCKET NUMBER: 2008-1345-WQ-E; IDENTIFIER: RN105502009; LOCATION: Parker County; TYPE OF FACILITY: storm water; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: Tommy Manion of Texas, Inc.; DOCKET NUMBER: 2008-0773-MWD-E; IDENTIFIER: RN105153613; LOCATION: Denton County; TYPE OF FACILITY: animal feeding operation; RULE VIOLATED: 30 TAC §321.31(a) and the Code, §26.121(a)(1), by failing to prevent an unauthorized discharge of wastewater; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: TOTAL PETROCHEMICALS USA, INC.; DOCKET NUMBER: 2008-0726-AIR-E; IDENTIFIER: RN102457520; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: plant that processes various grades of crude oil into a variety of petroleum products; RULE VIOLATED: 30 TAC §101.201(a)(1)(A) and (B), by failing to report emission events timely; and 30 TAC §116.115(c), Permit Number 49743, Maximum Allowable Emission Sources - SC 1, and THSC, §382.085(b), by failing to prevent the release of unauthorized contaminants into the atmosphere; PENALTY: $15,496; SEP offset amount of $6,198 applied to RC&D - Clean School Buses; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(27) COMPANY: Vidal Trejo; DOCKET NUMBER: 2008-1324-OSI-E; IDENTIFIER: RN103846325; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: United States Department of the Army Corpus Christi Army Depot; DOCKET NUMBER: 2008-0636-AIR-E; IDENTIFIER: RN100223197; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: instillation; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(C), FOP Number O-1638, GTC, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $2,425; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(29) COMPANY: Valero Refining-Texas, L.P.; DOCKET NUMBER: 2007-1545-AIR-E; IDENTIFIER: RN100211663; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: petroleum refining company; RULE VIOLATED: 30 TAC §116.715(a), Permit Number 2937, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.211(b)(1)(H) and (I) and THSC, §382.085(b), by failing to submit an administratively complete final report within two weeks after the end of the activity; PENALTY: $5,382; SEP offset amount of $2,153 applied to Texas A&M Corpus Christi - AutoCheck Program; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(30) COMPANY: Weatherford 202, LLP; DOCKET NUMBER: 2008-0703-WQ-E; IDENTIFIER: RN105272157; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $2,850; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: Williamson Printing Corporation; DOCKET NUMBER: 2008-0798-AIR-E; IDENTIFIER: RN100214741; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: offset lithographic

printing operation; RULE VIOLATED: 30 TAC §122.145(2)(C) and THSC, §382.085(b), by failing to timely submit the required deviation report; 30 TAC §122.146(2) and THSC, §382.085(b), by failing to timely submit the required ACC; and 30 TAC §122.133(2) and THSC, §382.085(b), by failing to timely submit an application to renew FOP Number O-01859; PENALTY: $10,000; SEP offset amount of $4,000 applied to Texas PTA - Clean School Bus Program; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200804881
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 9, 2008

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Notice of Meeting on October 23, 2008, in Clarksville City, Texas, Concerning the Voda Petroleum, Inc. Proposed State Superfund Site

The purpose of the meeting is to obtain public input and information concerning the proposed remedy for the Voda Petroleum, Inc. State Superfund site (site).

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) is issuing this public notice of a proposed selection of remedy for the Voda Petroleum state Superfund site. In accordance with 30 TAC §335.349(a) concerning requirements for the remedial action, and Texas Health and Safety Code (THSC), §361.187, concerning the proposed remedial action, a public meeting regarding the commission's selection of a proposed remedy for the site shall be held. The statute requires that the commission shall publish notice of the meeting in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located at least 30 days before the date of the public meeting. This notice was also published in the *Longview News Journal* on September 19, 2008.

The public meeting is scheduled for Thursday, October 23, 2008, 7:00 p.m., at the Broadway Elementary School Cafeteria, 200 East Broadway, in Gladewater, Texas. The public meeting is not a contested case hearing under Texas Government Code, Chapter 2001.

The site was proposed for listing on the state registry of Superfund sites in the November 17, 2000, issue of the *Texas Register* (25 TexReg 11594). The site is located at 211 Duncan Road, Clarksville City, Gregg County, Texas.

Voda Petroleum, Inc. (aka Ultra Oil) was operated as a waste oil recycling facility from 1981 until it was abandoned in 1991. The site is located in a residential neighborhood with occupied residences directly on the east and west sides of the facility. A review of the facility waste management activity records revealed that Voda Petroleum, Inc. (aka Ultra Oil) had received, stored and processed waste gasolines; oily wastes; used oil mixed with methyl ethyl ketone, varsol, trichloroethane, toluene, and hexane; crude oil; greases; and waxes. In 1996, the United States Environmental Protection Agency (EPA) conducted an emergency removal of 462 55-gallon drums of grease or oily wastes, 14 55-gallon drums of corrosive wastes, 16 above-ground tanks, and associated contaminated soil. The site was then backfilled to approximate the undisturbed topography to facilitate site drainage. The EPA post removal testing of soil and groundwater samples indicated that soil and groundwater continued to be contaminated above appropriate cleanup levels.

A Feasibility Study (FS), dated January 2008, screened and evaluated remedial alternatives which could be used to cleanup the site. The FS report developed three alternatives for remediation of surface and subsurface soils and three alternatives for shallow groundwater. The commission prepared the Proposed Remedial Action Document in June 2008. This document presents the proposed remedy and justification for how this remedy demonstrates compliance with the relevant cleanup standards.

Based on the calculated volume of contaminated soil and the requirement for protection of groundwater, the recommended soil remedial alternative from the FS is excavation with offsite disposal. The recommended alternative is the most cost effective, reasonable and appropriate remedy to address the contaminated soil at the site.

As the shallow groundwater at the site is considered a usable groundwater resource, the groundwater must be cleaned up to drinking water standards. The FS recommended the installation of two reactive biobarriers systems. The downgradient biobarrier would consist of a line of 64 biosubstrate injection points oriented in a 320-foot line along the margin of the plume. A second biobarrier would be installed near the source area and would consist of a line of 36 injection points along a 180-foot line. The passive barrier would be constructed by injecting biosubstrate in the upper 22 feet of the saturated zone at injection points spaced five feet apart. The biosubstrate would be capable of providing a long-lasting source of dissolved oxygen to promote sustained aerobic biodegradation. The recommended alternative is the most cost effective, reasonable and appropriate remedy to address the contaminated groundwater at the site.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted prior to the public meeting must be received by 5:00 p.m on October 22, 2008, and should be sent in writing to Ms. Carol Boucher, P.G., Project Manager, TCEQ, Remediation Division, MC 136, P.O. Box 13087, Austin, Texas 78711-3087, or facsimile at (512) 239-2450. The public comment period for this action will end at the close of the public meeting on October 23, 2008.

A portion of the record for this site including documents pertinent to the proposed remedy is available for review during regular business hours at the Longview Public Library, 222 West Cotton Street, Longview, Texas 75601, (903) 237-1350. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Information is also available regarding the state Superfund program at *www.tceq.state.tx.us/remediation/superfund/sites/index.html*.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (800) 633-9363 or (512) 239-2141. Requests should be made as far in advance as possible.

For further information about this site or the public meeting, please call Bruce McAnally, TCEQ Community Relations, at (800) 633-9363, extension 2141.

TRD-200804879
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 9, 2008

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 20, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 20, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: David Hughitt dba Hughitt Tire Disposal; DOCKET NUMBER: 2003-0081-MSW-E; TCEQ ID NUMBER: RN102805652; LOCATION: Rural Route 3, Box 134, on County Road 213, Hico, Hamilton County, Texas; TYPE OF FACILITY: scrap tire transportation operation; RULES VIOLATED: 30 TAC §§328.59(a), 328.60(a), and 328.63(c); and Texas Health and Safety Code (THSC), §361.112(a), by failing to obtain a scrap tire storage registration prior to storing more than 500 used and/or scrap tires at the facility; 30 TAC §328.54(d), by failing to identify the vehicle used to transport used and/or scrap tires; 30 TAC §328.57(d), by failing to retain all work orders and invoices showing the collection and disposition of all used and scrap tires and pieces for a three-year period; 30 TAC §328.57(e), by failing to submit to the executive director an annual report from January 1, 2001, through December 31, 2001, indicating the number and type of used or scrap tires collected listed by generator name, address, the disposition of the tires, and the number of whole used or scrap tires delivered to each facility; and 30 TAC §328.58(b), by failing to complete all required information on the tire manifests; PENALTY: $6,930; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: One Way Hauling, Inc.; DOCKET NUMBER: 2007-1964-WQ-E; TCEQ ID NUMBER: RN100581479; LOCATION: 120 Oil Patch Road, Laredo, Webb County, Texas; TYPE OF FACILITY: oil field drilling equipment and bulk barite transportation facility; RULES VIOLATED: 30 TAC §281.25(a)(4) and Texas Pollutant Discharge Elimination System (TPDES) Multi Sector General Permit (MSGP) Number TXR05V539, Part III., Section A.5(b)(3), by failing to label drums, tanks, and containers; 30 TAC §281.25(a)(4) and TPDES MSGP Number TXR05V539, Part III., Sections A.5(f), A.7(c)(4), and E.3(e)(2), by failing to retain records and reports for a period of three years and maintain the records at the facility or have them readily available for review by a TCEQ representative; 30 TAC §281.25(a)(4) and TPDES MSGP Number TXR05V539, Part III., Section A.5(g), by failing to conduct quarterly inspections of pollution prevention measures and controls; 30 TAC §281.25(a)(4) and TPDES MSGP Number TXR05V539, Part III., Section D.1(c), by failing to sample and analyze storm water discharges for hazardous metals at a minimum frequency of once per year; 30 TAC §281.25(a)(4) and TPDES MSGP Number TXR05V539, Part III., Section A.5(b)(6) and Part V., Section P.2, by failing to provide adequate spill prevention and response measures; and 30 TAC §281.25(a)(4) and TPDES MSGP Number TXR05V539, Part III., Section C.1(c), by failing to maintain a rain gauge on-site or utilize a rain gauge located in the immediate vicinity of the facility to determine when a representative storm event occurs; PENALTY: $14,500; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(3) COMPANY: The City of Normangee; DOCKET NUMBER: 2008-1362-MWD-E; TCEQ ID NUMBER: RN101916385; LOCATION: Caney Creek, east of Farm-to-Market Road 39, in Normangee, Leon County, Texas; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and TPDES Permit Number 10356001 (the Permit) Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; 30 TAC §305.125(5) and the Permit Operational Requirement Number 1, by failing to properly operate and maintain all systems of collection, treatment, and disposal; 30 TAC §30.350(c), (j), and (l) and the Permit Operational Requirement Number 1, by failing to ensure that the facility is operated by a licensed chief operator or an operator holding the required level of license or higher a minimum of five days per week; 30 TAC §305.125(1) and (4), TWC, §26.121(a)(1), and the Permit Operational Requirements Number 1, Interim Effluent Limitations and Monitoring Requirements Number 4, Permit Conditions Number 2.g., by failing to prevent discharge and accumulation sludge in the receiving stream; TWC, §26.121(a)(1), by failing to prevent the unauthorized discharge of wastewater into Caney Creek; and 30 TAC §305.63(a) and TWC, §26.121(a)(1), by failing to obtain authorization to discharge wastewater into or adjacent to waters in the state; PENALTY: $44,315; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200804904
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 9, 2008

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the pro-

posed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 20, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 20, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Cesar Vasquez; DOCKET NUMBER: 2007-1272-WOC-E; TCEQ ID NUMBER: RN103329181; LOCATION: 337 Hourglass Drive, El Paso, El Paso County, Texas; TYPE OF FACILITY: backflow prevention assembly testing (BPAT) business; RULES VIOLATED: 30 TAC §30.5(a) and (b) and TWC, §37.003, by failing to hold a BPAT license prior to conducting tests of reduced pressure zones and failed to comply with BPAT requirements by the unauthorized use of a license of someone else who possesses a current BPAT license; PENALTY: $1,750; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(2) COMPANY: Emilio Garza dba Evergreen Professional Lawn Maintenance Services; DOCKET NUMBER: 2007-1281-LII-E; TCEQ ID NUMBER: RN105197636; LOCATION: 1409 East Polk, Harlingen, Cameron County, Texas; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(b) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to possess a license or registration prior to advertising or representing to the public that services, for which a license or registration is required, can be performed; PENALTY: $262; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: Fallbrook Enterprises, Inc. dba Fashion Cleaners; DOCKET NUMBER: 2006-1544-DCL-E; TCEQ ID NUMBER: RN104355912; LOCATION: 8925 Fallbrook Drive, Suite 1200, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code (THSC), §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; and 30 TAC §337.14(c) and TWC, §5.702, by failing to pay dry cleaner registration fees for TCEQ Financial Administration Account Number 24004034 and associated late fees for the Fiscal Year 2007; PENALTY: $1,185; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Huong Tran; DOCKET NUMBER: 2008-0280-PST-E; TCEQ ID NUMBER: RN101906188; LOCATION: 2605 Avenue A, Beaumont, Jefferson County, Texas; TYPE OF FACILITY: property with out-of-service underground petroleum storage tanks; RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(b) and (d)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, four underground storage tanks (USTs) for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and by failing to ensure that any residue from stored regulated substances which remained in the temporarily out-of-service UST system did not exceed a depth of 2.5 centimeters and did not exceed .3% by weight of the system at full capacity; and by failing to maintain all piping, pumps, mainways, tank access points, and ancillary equipment in a capped, plugged, locked, or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: $21,000; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Jake Davis; DOCKET NUMBER: 2007-0606-PST-E; TCEQ ID NUMBER: RN101572832; LOCATION: 1005 South Oak Avenue, Mineral Wells, Palo Pinto County, Texas; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $7,875; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Jason S. Goff; DOCKET NUMBER: 2007-0875-LII-E; TCEQ ID NUMBER: RN103496394; LOCATION: 7258 River Valley Court, Benbrook, Tarrant County, Texas; TYPE OF FACILITY: licensed landscape irrigator; RULES VIOLATED: 30 TAC §344.70, by failing to comply with the landscape irrigation inspection requirements, ordinances or regulations designed to protect the public water supply; PENALTY: $262; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Jeff Dutton dba Dutton Cattle Company; DOCKET NUMBER: 2008-0059-MLM-E; TCEQ ID NUMBER: RN104913702; LOCATION: 12708 Ten Mile Road, Mason County, Texas; TYPE OF FACILITY: animal feeding operation; RULES VIOLATED: 30 TAC §321.47(e)(5), by failing to have a rain gauge installed on site; 30 TAC §321.47(e)(6), by failing to maintain a permanent pond marker in the retention control structure (RCS); 30 TAC §321.47(e)(7), by failing to ensure that the pond liners were protected from animals by fences or other protective devices; 30 TAC §321.47(d)(3) and (5) and §321.38(e)(2), by failing to ensure that all construction and design of the RCS, including embankments and liners, were certified by a licensed Texas professional engineer; 30 TAC §321.47(d)(8), by failing to equip the RCS with an irrigation, evaporation, or liquid removal system capable of dewatering the RCS; 30 TAC §335.4, by failing to properly dispose of industrial

solid waste; and 30 TAC §111.201 and THSC, §382.085(b), by failing to prevent the outdoor burning of waste; PENALTY: $9,975; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(8) COMPANY: Joe Macias; DOCKET NUMBER: 2007-1686-PST-E; TCEQ ID NUMBER: RN101828002; LOCATION: 518 Madison, Sagerton, Haskell County, Texas; TYPE OF FACILITY: fuel station; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $7,875; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(9) COMPANY: Kim Phuong Tran dba Kims Cleaners; DOCKET NUMBER: 2006-1694-DCL-E; TCEQ ID NUMBER: RN104995105; LOCATION: 3027 East North Belt, Humble, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: Ludivinia Granados dba Venecias Bar; DOCKET NUMBER: 2007-1778-PST-E; TCEQ ID NUMBER: RN103002887; LOCATION: 6918 West Expressway 83, Mission, Hidalgo County, Texas; TYPE OF FACILITY: nightclub; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to provide amended registration regarding USTs within 30 days from the date of occurrence of the change or addition; PENALTY: $6,300; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200804905
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 9, 2008

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: Semiannual Report due July 15, 2008, for Candidates and Officeholders

Andy M. Chatham, 137 Pittsburg St., Ste. A, Dallas, Texas 75207-7213

Randy Frazier, 2450 Louisiana St., Ste. 400-514, Houston, Texas 77006-2380

Henry E. Gilbert, P.O. Box 1930, Whitehouse, Texas 75791-1930

Lehman Jeremiah Harris, 519 E. Interstate 30 #715, Rockwall, Texas 75087-5408

Kevin T. Howell, 3423 S. Julian Blvd., Amarillo, Texas 79102-2032

Jeff Humber, 1721 High Ridge Road, Benbrook, Texas 76126-2907

Grace G. Kunde, 7674 Linne Road, Seguin, Texas 78155-9395

Christopher G. Lane, 429 Weeping Willow Dr., Temple, Texas 76502-5301

Norm D. Ley, 13451 Parkway Blvd., Sugar Land, Texas 77478-3648

Jim Pruitt, P.O. Box 823279, Dallas, Texas 75382-3279

Antonio M. Rodriguez, P.O. Box 1576, Presidio, Texas 79845-1576

Phillip S. Smart, P.O. Box 217, Ferris, Texas 75125-0217

Jorge Borunda Zaragoza, 1049 W. 16th St., Houston, Texas 77008-3427

Deadline: Semiannual Report due July 15, 2008, for Political Action Committees

James S. Bowie, Citizens for Term Limitation, P.O. Box 16855, Houston, Texas 77222-6855

Joseph E. DeLaCerda, Hill Country Strategies, 1606 N. IH 35, Apt. 83, San Marcos, Texas 78666-6728

Carmen M. Forbes, Memorial West Republican Women PAC, 10702 Meadow lake Ln., Houston, Texas 77042-2815

Stephanie Phillips, Justice For All PAC, 6115 Reamer St., Houston, Texas 77074-7543

Heather Ramon-Ayala, Texans for Local Control, 3822 Blue Oak Pass, San Antonio, Texas 78223

Tracy A. Smith, Wise County Active Democrats, 1562 County Road 2625, Decatur, Texas 76234

Bruce A. Tankleff, Texas Democratic Women of Montgomery County PAC, 15 Gillium Bluff Pl., The Woodlands, Texas 77382

Sally E. Terrell, Allen Area Republican Women - PAC, 611 Glen Rose Dr., Allen, Texas 75013

Ginger Vuich, National Homeowners Federation, 8500 Leesburg Pike, Ste. 208, Vienna, Virginia 22182

Jeanette Wickwire, Automobile Insurance Agents of Texas PAC, 1306 W. Anderson Ln., Ste. A, Austin, Texas 78757

Andrea P. Williams, Tri County Republican Women, 2404 S. Grand Blvd., Ste. 120, Pearland, Texas 77581

TRD-200804761
David Reisman
Executive Director
Texas Ethics Commission
Filed: September 3, 2008

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Texas Facilities Commission

Request for Proposals #303-9-10104

The Texas Facilities Commission (TFC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), announces the issuance of Request for Proposals (RFP) #303-9-10104. TFC seeks a

5 or 10 year lease of approximately 4,948 square feet of office space in Fort Worth, Tarrant County, Texas.

The deadline for questions is September 26, 2008 and the deadline for proposals is October 17, 2008 at 3:00 p.m. The award date is November 19, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=78741*.

TRD-200804850
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 8, 2008

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Request for Proposals #303-9-10158

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice, announces the issuance of Request for Proposals (RFP) #303-9-10158. TFC seeks a 10 year lease of approximately 5,545 square feet of office space in Williamson County, Texas.

The deadline for questions is October 1, 2008 and the deadline for proposals is October 10, 2008 at 3:00 p.m. The award date is November 19, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=78778*.

TRD-200804907
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 9, 2008

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Request for Proposals #303-9-10159

The Texas Facilities Commission (TFC), on behalf of the Department of Assistive and Rehabilitative Services, announces the issuance of Request for Proposals (RFP) #303-9-10159. TFC seeks a 5 or 10 year lease of approximately 6,051 square feet of office space in San Antonio, Texas.

The deadline for questions is October 1, 2008 and the deadline for proposals is October 10, 2008 at 3:00 p.m. The award date is November 19, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=78783*.

TRD-200804916
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 10, 2008

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General Land Office

Notice of Extension of Public Comment Period

The General Land Office (GLO) hereby gives notice that it is providing an additional 4-day extension of the period for public comment for a total of 124 days for proposed rule amendments and new rules concerning 31 TAC Chapter 15 relating to Coastal Area Planning, Management of the Beach/Dune System, and Coastal Erosion Planning and Response originally published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3885 and 33 TexReg 3894).

The GLO proposed amendments to §15.2, relating to definitions of small and large scale construction and restoration, and §15.3, relating to review periods for large and small scale construction, standard and expedited periods for review of local government beach and dune plans by the GLO, and determination of the line of vegetation by the GLO necessary for establishing the boundary of the public beach easement. The GLO proposed an amendment to §15.8, relating to beach user fees. The GLO also proposed new §15.16 and amended §15.41 in order to provide guidelines for local governments to establish Erosion Response Plans (ERPs) that incorporate a building set-back line.

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., September 19, 2008.

TRD-200804906
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: September 9, 2008

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Texas Health and Human Services Commission

Notice of Adopted Medicaid Provider Payment Rates

Adopted Rates. As the single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC) has adopted new per diem payment rates for the nursing facility program operated by the Texas Department of Aging and Disability Services (DADS). These payment rates were determined in accordance with the rate setting methodologies listed below under "Methodology and Justification." The proposed rates and public hearing notice were published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4366).

The adopted payment rates, which were effective September 1, 2008, are as follows:

Base Rates by Resource Utilization Group (RUG) Class

RUG	RUG Base Rate
RAD	$191.22
RAC	$168.11
RAB	$157.53
RAA	$137.75
SE3	$230.01
SE2	$194.25
SE1	$167.46
SSC	$163.47
SSB	$154.13
SSA	$153.89
CC2	$132.06
CC1	$124.72
CB2	$120.65
CB1	$114.87
CA2	$108.90
CA1	$101.97
IB2	$108.92
IB1	$101.13
IA2	$91.91
IA1	$86.82
BB2	$106.84
BB1	$96.06
BA2	$90.08
BA1	$80.90
PE2	$115.36
PE1	$108.72
PD2	$110.40
PD1	$103.53
PC2	$100.69
PC1	$96.30
PB2	$93.58
PB1	$88.75
PA2	$82.93
PA1	$77.86
Default when Minimum Date Set assessment data are incomplete	$77.86
Default when a Minimum Data Set assessment is missing.	$77.86
Supplemental Payments:	
Ventilator - Continuous	$122.40
Ventilator - Less than Continuous	$48.96
Pediatric Tracheostomy	$73.44

Facilities participating in the Enhanced Direct Care Staff Rate will receive one of the following payment rates per day in addition to the above payment rates based upon their level of enrollment in the Enhanced Direct Care Staff Rate. Enrollment levels are indicated by the number of Licensed Vocational Nurse (LVN) equivalent minutes a facility is required to provide to avoid recoupment of enhanced funds. LVN-equivalent minutes can be provided by Registered Nurses (RNs), LVNs, Medication Aides and/or Certified Nurse Aides.

Add-on Rates by Enhancement Level

Minutes Associated with Adopted Rate	Adopted Rate Per Diem
1 LVN Minute = 2.13 Aide Minutes = 0.69 RN Minutes	$0.34
2 LVN Minutes = 4.25 Aide Minutes = 1.39 RN Minutes	$0.68
3 LVN Minutes = 6.38 Aide Minutes = 2.08 RN Minutes	$1.02
4 LVN Minutes = 8.50 Aide Minutes = 2.78 RN Minutes	$1.36
5 LVN Minutes = 10.63 Aide Minutes = 3.47 RN Minutes	$1.70
6 LVN Minutes = 12.75 Aide Minutes = 4.16 RN Minutes	$2.04
7 LVN Minutes = 14.88 Aide Minutes = 4.86 RN Minutes	$2.38
8 LVN Minutes = 17.00 Aide Minutes = 5.55 RN Minutes	$2.72
9 LVN Minutes = 19.13 Aide Minutes = 6.25 RN Minutes	$3.06
10 LVN Minutes = 21.25 Aide Minutes = 6.94 RN Minutes	$3.40
11 LVN Minutes = 23.38 Aide Minutes = 7.63 RN Minutes	$3.74
12 LVN Minutes = 25.50 Aide Minutes = 8.33 RN Minutes	$4.08
13 LVN Minutes = 27.63 Aide Minutes = 9.02 RN Minutes	$4.42
14 LVN Minutes = 29.75 Aide Minutes = 9.71 RN Minutes	$4.76
15 LVN Minutes = 31.88 Aide Minutes = 10.41 RN Minutes	$5.10
16 LVN Minutes = 34.00 Aide Minutes = 11.10 RN Minutes	$5.44
17 LVN Minutes = 36.13 Aide Minutes = 11.80 RN Minutes	$5.78
18 LVN Minutes = 38.25 Aide Minutes = 12.49 RN Minutes	$6.12
19 LVN Minutes = 40.38 Aide Minutes = 13.18 RN Minutes	$6.46
20 LVN Minutes = 42.50 Aide Minutes = 13.88 RN Minutes	$6.80
21 LVN Minutes = 44.63 Aide Minutes = 14.57 RN Minutes	$7.14
22 LVN Minutes = 46.75 Aide Minutes = 15.27 RN Minutes	$7.48
23 LVN Minutes = 48.88 Aide Minutes = 15.96 RN Minutes	$7.82
24 LVN Minutes = 51.00 Aide Minutes = 16.65 RN Minutes	$8.16
25 LVN Minutes = 53.13 Aide Minutes = 17.35 RN Minutes	$8.50
26 LVN Minutes = 55.25 Aide Minutes = 18.04 RN Minutes	$8.84
27 LVN Minutes = 57.38 Aide Minutes = 18.74 RN Minutes	$9.18

Facilities that verify liability insurance coverage acceptable to HHSC will receive one of the following payment rates per day in addition to the above payment rates based upon the type of liability insurance coverage they maintain:

Type of Liability Insurance	Adopted Rate Per Diem
General and Professional	$1.93
Professional Only	$1.77
General Only	$0.16

Methodology and Justification. The adopted rates were determined in accordance with the rate setting methodologies codified at 1 TAC Chapter 355, Subchapter C, §355.307, Reimbursement Setting Methodology, §355.308, Direct Care Staff Rate Component, and §355.312, Reimbursement Setting Methodology--Liability Insurance Costs. These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A, §355.101 (relating to Introduction) and §355.109 (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs). These changes are being made in accordance with the 2008-09 General Appropriations Act (Article IX, §19.82, H.B. 1, 80th Legislature, Regular Session, 2007), which appropriated $72.0 million in general revenue funds for State Fiscal Year 2009 for provider rate increases for the DADS Nursing Facility Program.

TRD-200804873
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: September 8, 2008

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective October 1, 2008.

The Texas Medicaid State Plan will be revised to reflect Medicaid fee changes for services provided by:

* Physicians and certain other practitioners

* Durable Medical Equipment, Prosthetics, Orthotics, and Supplies

* Family Planning Services

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $2,555,143 for federal fiscal year (FFY) 2009, with approximately $1,590,878 in federal funds and $964,265 in state general revenue (GR). For FFY 2010, the estimated additional aggregate expenditure is $2,835,325, with approximately $1,832,268 in federal funds and $1,003,057 in GR. For FFY 2011, the estimated additional aggregate expenditure is $3,079,163, with approximately $1,977,575 in federal funds and $1,101,588 in GR.

Interested parties may obtain copies of the proposed amendments by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at Dan.Huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200804909
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: September 9, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Kosse	Luminant Mining Company LLC	L06177	Kosse	00	08/18/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	97	08/22/08
Austin	Columbia St Davids Healthcare System LP DBA South Austin Hospital	L03273	Austin	79	08/08/08
Austin	ARA Imaging	L05862	Austin	38	08/20/08
Austin	Daughters of Charity Health Services of Austin DBA Seton Medical Center Austin	L02896	Austin	98	08/21/08
Borger	GPCH LLC DBA Golden Plains Comm Hospital	L04369	Borger	14	08/22/08
Burnet	Daughters of Charity Health Services of Austin DBA Seton Highland Lakes	L03515	Burnet	35	08/11/08
Conroe	CHCA Conroe LP DBA Conroe Regional Medical Center	L01769	Conroe	78	08/28/08
Corpus Christi	A Lee Guinn MD PA DBA Longevity and Wellness Center of S Tx	L05799	Corpus Christi	05	08/21/08
Crockett	East Texas Medical Center	L01411	Crockett	32	08/28/08
Dallas	GAF Materials Corporation	L03811	Dallas	14	08/18/08
Dallas	Texas Oncology PA DBA Sammons Cancer Ctr.	L04878	Dallas	41	08/08/08
Del Rio	Val Verde Regional Medical Center	L01967	Del Rio	31	08/20/08
Denton	University of North Texas Radiation Safety Off	L00101	Denton	83	08/20/08
Floresville	Wilson County Memorial Hospital District DBA Connally Memorial Medical Center	L03471	Floresville	18	08/20/08
Fort Worth	Fort Worth Medical Plaza, Inc. DBA Columbia Plaza Medical Ctr. of Fort Worth	L02171	Fort Worth	53	08/20/08
Fort Worth	Radiology Associates	L03953	Fort Worth	46	08/19/08
Harlingen	Valley Baptist Medical Center	L01909	Harlingen	69	08/19/08
Harlingen	Valley Baptist Medical Center	L01909	Harlingen	70	08/26/08
Houston	Advanced Nuclear Consultants	L06167	Houston	01	08/19/08
Houston	Columbia/HCA Healthcare Corporation DBA Spring Branch Medical Center	L02473	Houston	69	08/19/08
Houston	Betabatt, Inc.	L05961	Houston	03	08/25/08
Houston	The Rose	L06010	Houston	01	08/20/08
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City	L01168	Houston	101	08/25/08
Houston	Memorial Hermann Healthcare System DBA Hermann Hospital	L04655	Houston	35	08/25/08
Houston	River Oaks Imaging and Diagnostic LP DBA River Oaks Imaging and Diagnostic	L05493	Houston	16	08/27/08
Katy	Memorial Hermann Hospital System DBA Memorial Hermann Katy Hospital	L03052	Katy	52	08/26/08
Kingsville	Texas A & M University Kingsville	L01821	Kingsville	35	08/13/08
Lubbock	Texas Cardiac Center	L05276	Lubbock	12	08/20/08
Mesquite	National Surgicare JV1 LTD. DBA Health South Surgery Center	L05654	Mesquite	03	08/20/08
Mt Pleasant	Titus County Memorial Hospital	L02921	Mt Pleasant	28	08/16/08

AMENDMENTS TO EXISTING LICENSES ISSUED (Continued from previous page):

Location	Name	License #	City	Amend-ment #	Date of Action
Nutech Inc	Nutech, Inc.	L04274	Tyler	65	08/19/08
Odessa	Ector County Hospital District DBA Medical Center Hospital	L01223	Odessa	88	08/13/08
Palestine	Palestine Principal Healthcare Ltd Partnership DBA Palestine Regional Medical Center	L02728	Palestine	41	08/20/08
Plano	Presbyterian Hospital of Plano	L04467	Plano	49	08/12/08
Plano	Presbyterian Hospital of Plano	L04467	Plano	50	08/25/08
Plano	Comprehensive Breast Care Center of Texas DBA Solis Womens Health	L05601	Plano	09	08/22/08
Point Comfort	Formosa Plastics Corporation - Texas	L03893	Point Comfort	39	08/21/08
Rockdale	Rockdale Blackhawk LLC DBA Richards Memorial Hospital	L06092	Rockdale	01	08/08/08
Round Rock	Scott and White Community Hospital Corp DBA Scott and White Hospital at University Medical Campus	L06085	Round Rock	02	08/19/08
San Antonio	Petnet Solutions, Inc.	L05569	San Antonio	20	08/12/08
San Antonio	M. M. Ontiveros, M.D. P.A.	L05675	San Antonio	06	08/22/08
Sugarland	Schlumberger Technology Corporation	L05677	Sugarland	05	08/19/08
Sulphur Spgs	Hopkins County Memorial Hospital	L02904	Sulphur Spgs	18	08/19/08
Throughout Tx	Professional Service Industries	L04947	Austin	17	08/15/08
Throughout Tx	Texas Department of Transportation Construction Division Materials and Pavements Section	L00197	Austin	141	08/15/08
Throughout Tx	Phoenix Non Destructive Testing Company	L04454	Channelview	56	08/21/08
Throughout Tx	Professional Service Industries	L04939	Corpus Christi	12	08/21/08
Throughout Tx	Shared Pet Imaging Inc Methodist Hospital of Dallas-Charlton	L06124	Dallas	01	08/19/08
Throughout Tx	Littleton Inspection Services	L04835	Duncanville	10	08/19/08
Throughout Tx	Metco	L03018	Houston	188	08/18/08
Throughout Tx	Thrubit LLC	L06030	Houston	06	08/18/08
Throughout Tx	Material Inspection Technology, Inc.	L05672	Houston	27	08/19/08
Throughout Tx	Q Pro, Inc. DBA Q Pro Technical Services	L05980	Houston	05	08/20/08
Throughout Tx	Metco	L03018	Houston	189	08/21/08
Throughout Tx	Turner Industries Group LLC DBA Pipe Fabrication Division Tx. Operations	L05237	Paris	21	08/21/08
Throughout Tx	Techcorr USA LLC	L05972	Pasadena	51	08/19/08
Throughout Tx	Intec	L05150	San Antonio	12	08/15/08
Throughout Tx	Professional Service Industries	L04946	San Antonio	10	08/21/08
Throughout Tx	B.J. Services Company USA	L02684	Tomball	61	08/18/08
Throughout Tx	Wren Oilfield Services	L04690	White Oak	08	08/21/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	138	08/18/08
Waco	Waco Cardiology Associates	L05158	Waco	15	08/21/08
Wadsworth	STP Nuclear Operating Company	L04222	Wadsworth	25	08/20/08
Webster	CHCA Clear Lake LP DBA Clear Lake Regional Medical Center	L01680	Webster	75	08/26/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Commerce	Tyco Healthcare - Kendall LP	L03314	Commerce	23	08/15/08
Throughout Tx	Pro Inspection, Inc.	L03906	Odessa	22	08/13/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Leaf on a Tree LP DBA Houston Town and Country Hospital	L05979	Houston	02	08/14/08
Houston	E+ PET Imaging VII, LP DBA PET Imaging of Houston - West	L05806	Houston	08	08/25/08
Pampa	Mundy Maintenance and Services, Inc.	L04360	Pampa	33	08/19/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - MC 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-200804890
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: September 9, 2008

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Notice of Public Hearing Concerning Ambulatory Surgical Center Licensing Rules

In accordance with Government Code, §2001.039, the Texas Department of State Health Services (department) proposes to revise the Ambulatory Surgical Center Licensing Rules at 25 Texas Administrative Code, Chapter 135.

The department will hold a public hearing on Tuesday, September 30, 2008, from 10:00 a.m. - 12:00 p.m. at the Department of State Health Services, Suite K-100, 1100 West 49th Street, Austin, Texas.

This meeting is to allow stakeholders the opportunity to verbally provide any comments or concerns regarding the rules to the department. A draft of the proposed rules is available for review at www.dshs.state.tx.us/hfp/rules.shtm.

Please contact Pamela Adams, Regulatory Licensing Unit, Facility Licensing Group, Department of State Health Services, Delivery Code 2835, P.O. Box 149347, Austin, Texas 78714-9347, or telephone (512) 834-6646 if you have questions.

We appreciate your input into the rule revision process.

TRD-200804883
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: September 9, 2008

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Heart of Texas Council of Governments

Request for Proposal for Audit Services

The Heart of Texas Council of Governments (HOTCOG) is soliciting proposals for an audit of all grants and programs of the Council. This proposal will serve as a basis for a one-year period beginning October 1, 2007 through September 30, 2008. Contract term may be extended for up to two (2) years.

The audit must be conducted under the guidelines of generally accepted auditing standards and other guidelines as presented in HOTCOG's request for proposal. The proposals will be reviewed by HOTCOG and a contract will be awarded on the basis of the firm's experience, firm knowledge of the work to be performed, and the proposed audit cost by year. Small, female-owned and minority-owned firms are encouraged to submit.

Request for proposal packages may be obtained by contacting John C. Minnix, Director of Administration, HOTCOG, 1514 South New Road, Waco, Texas 76711, (254) 292-1800. Proposal packages will not be faxed or emailed. All proposals must be received no later than 4:30 p.m. (Central Standard Time) on October 8, 2008. Proposals received after the specified date and time will not be considered.

TRD-200804882
Mary McDow
Personnel Manager
Heart of Texas Council of Governments
Filed: September 9, 2008

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Texas Higher Education Coordinating Board

Correction of Error

The Texas Higher Education Coordinating Board proposed new §5.8, concerning Uniform Grade-Point Average Calculation for Admission to General Academic Teaching Institutions, in the September 5, 2008,

issue of the *Texas Register* (33 TexReg 7395). The last sentence of the first paragraph, including the implementation date, is incorrect.

The paragraph should read as follows:

"The Texas Higher Education Coordinating Board proposes new §5.8 concerning Uniform Grade Point Average Calculation. Specifically, this new section concerning Uniform Grade Point Average Calculation will establish a standard method for computing a student's high school grade point average. The method must be based on a four-point scale and give additional weight to more rigorous courses."

TRD-200804925

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Texas Department of Housing and Community Affairs

Announcement of a Request for Proposal for Investment Banking Services for Single Family Mortgage Revenue Bond New Issues and/or Refundings

The Texas Department of Housing and Community Affairs ("TDHCA") is issuing this Request for Proposal ("RFP") for investment banking firms interested in providing investment banking services from time to time as Senior Manager or Co-Manager for one or more of its proposed single family mortgage revenue bond new issues and/or refundings.

Responses to the RFP must be emailed to TDHCA no later than 4:00 p.m. C.D.T. on Friday, October 17, 2008. To obtain a copy of the RFP, please email your request to the attention of Heather Hodnett at heather.hodnett@tdhca.state.tx.us or visit the Bond Finance Division web page at www.tdhca.state.tx.us.

TRD-200804898
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: September 9, 2008

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HOME Single Family Persons with Disabilities Notice of Funding Availability (NOFA)

1) Summary.

a) The Texas Department of Housing and Community Affairs ("the Department") announces the availability of $1,500,000 in funding from the HOME Investment Partnerships Program (HOME) 2008 allocation for single family housing programs including Homebuyer Assistance (HBA) and Tenant-Based Rental Assistance (TBRA) to assist low income, persons with disabilities. For the first one hundred eighty (180) days of this NOFA, $750,000 in funding will be available for the HBA activity and $750,000 in funding will be available for the TBRA program activity. Funding will be available in any area of the state including Participating Jurisdictions (PJs). After the first one hundred eighty (180) day cycle, funds will be available on a first-come, first-served basis to either activity in any area of the state (including PJs).

b) The availability and use of these funds is subject to the Department's HOME Program Rule at Title 10 Texas Administrative Code (10 TAC) Chapter 53 in effect at the time the application is submitted, the Federal HOME regulations governing the HOME program (24 CFR Part 92), and Chapter 2306, Texas Government Code. Other federal regulations may also apply such as, but not limited to, 24 CFR Parts 50 and 58 for environmental requirements, 24 CFR §85.36 and §84.42 for conflict of interest and 24 CFR Part 5, Subpart A for fair housing. Applicants are encouraged to familiarize themselves with all of the applicable state and federal rules that govern the program.

2) Allocation of Funds.

a) These funds are made available through the Department's 2008 annual HOME allocation from the U.S. Department of Housing and Urban Development (HUD). The funds are set-aside for eligible applicants proposing to provide assistance to eligible homebuyers for the acquisition or acquisition and rehabilitation for accessibility of affordable single family housing and households seeking rental subsidies including security and utility deposits through tenant-based rental assistance. Households assisted with HOME funds must be at or below 80% of the Area Median Family Income (AMFI) and meet the definition of a person with disability, as defined by HUD.

b) In accordance with 10 TAC §53.48(a) this NOFA will be an open application cycle on statewide first-come, first-served basis. TBRA funds will be available for the first ninety (90) days only to those applicants proposing to assist persons transitioning from an institution and at least 50% of the total households proposed must be targeted to persons transitioning from an institutional setting into a community placement or community setting. Applications will be accepted by the Department on an on-going basis until all funds have been requested or 5:00 p.m. Friday, December 19, 2008, regardless of method of delivery.

c) On Monday, December 22, 2008 funds not requested under the first 90-day cycle will be made available to any eligible applicant under each activity specified in this NOFA. Applications will be accepted by the Department on an on-going basis until all funds have been requested or 5:00 p.m. Friday, March 20, 2009, regardless of method of delivery.

d) On Monday, March 23, 2009 any remaining funds not requested under either the HBA or TBRA set-aside will be made available to either activity specified in this NOFA. Applications will be accepted by the Department on an on-going basis until all funds have been requested or 5:00 p.m. Friday, May 29, 2009.

3) Limitation on Funds.

a) Funds are eligible for use in a Participating Jurisdiction (PJ) as described in the 2008 State of Texas Consolidated Plan One-Year Action Plan.

b) The Department awards HOME funds to eligible organizations and the maximum award amount may not exceed $300,000 for Homebuyer Assistance and $300,000 for Tenant-Based Rental Assistance. Up to $500,000 may be awarded to Homebuyer Assistance applicants whose Service Area includes multiple counties within a Uniform State Service Region.

c) With the exception of Tenant Based Rental Assistance, the minimum amount of HOME assistance per unit is $1,000. The per-unit subsidy may not exceed the per-unit dollar limits established by the U.S. Department of Housing and Urban Development (HUD) under §221(d)(3) of the National Housing Act, which are applicable to the area in which the development is located, and as published by HUD. The purchase price of the housing unit, plus the value of the rehabilitation if applicable, must not exceed 95% of the area's median purchase price as specified in the HUD §203(b) Limits.

d) Each applicant that is awarded HOME funds may also be eligible to receive funding for administrative costs. In accordance with the 2008 State of Texas Consolidated Plan One Year Action Plan, the award amount for administrative costs shall not exceed six percent (6%) of the total project funds requested.

4) Eligible and Prohibited Activities.

a) Eligible activities include those permissible under the federal HOME Final Rule at 24 CFR §92.205 and the Department's HOME Program Rule at 10 TAC §53.32 for HBA and §53.33 for TBRA.

b) Prohibited activities include those at 24 CFR §92.214 and 10 TAC §53.37.

5) Eligible and Ineligible Applicants.

a) Eligible Applicants are Units of General Local Government, Nonprofit Organizations, Public Housing Authorities (PHAs), and for-profit entities.

b) Applicants may be ineligible for funding if they meet any of the criteria listed in 10 TAC §53.42 of the Department's HOME Program Rule. Applicants are encouraged to familiarize themselves with the Department's certification and debarment policies prior to application submission.

6) Affordability Requirements.

a) Applicants should be aware that there are minimum affordability periods necessary for HOME-assisted housing. Single family housing units assisted with HOME funds must comply with the required affordability requirements as defined at 24 CFR §92.254. Awarded organizations will provide the HOME assistance to the homebuyer in the form of a loan. Each loan will be in the form of a zero percent (0%) interest, deferred forgivable loan with a term based on the total amount of assistance provided and in accordance with 24 CFR §92.254. All loans to assisted homebuyers must be evidenced by loan documents provided by the Department. Each loan to an assisted homebuyer must be payable to Department.

b) If at any time prior to the full loan period there occurs a resale of the property, a refinance of any superior lien, a repayment of any superior lien, or if the unit ceases to be the assisted Household's principal residence, the remaining loan balance shall become due and payable.

c) Forgiveness of the loan balance is calculated based on a pro-rata annual share of the loan term. The anniversary date of the loan shall constitute completion of the year. Any partial year shall not be waived. The amount due will be based on the pro-rata share number of years of the remaining loan term.

d) In the event the home is sold (voluntary or involuntary), the assisted Household will pay the loan balance from the shared net proceeds of the sale. The shared net proceeds are the sales price minus superior loan repayment (other than HOME funds) and any closing costs. A copy of the HUD closing statement must be provided.

7) Site and Construction Restrictions.

a) Pursuant to 24 CFR §92.251, housing that is constructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances at the time of project completion. In the absence of a local code for new construction or rehabilitation, HOME-assisted new construction or rehabilitation must meet, as applicable, the International Residential Code, Texas Minimum Construction Standards (TMCS) and be in compliance with the basic access standards in new construction, established by §2306.514, Texas Government Code. In addition, housing that is rehabilitated with funds awarded under this NOFA must meet energy efficiency standards established by §2306.187 of the Texas Government Code, and energy standards as verified by RESCHECK, in accordance with the Final Rule.

b) All other HOME-assisted housing (e.g., acquisition) must meet all applicable State and local housing quality standards and code requirements and if there are no such standards or code requirements, the housing must meet the housing quality standards in 24 CFR §982.401. When HOME funds are used for a rehabilitation development the entire unit must be brought up to the applicable property standards, pursuant to 24 CFR §92.251(a)(1).

c) Rental units secured though HOME assistance must be inspected prior to occupancy, inspected annually, and must comply with Housing Quality Standards (HQS) established by HUD in 24 CFR Part 92.

8) Homebuyer Assistance (HBA).

a) During the first one hundred eighty (180) days of this NOFA, approximately $750,000 of the HOME funds released under this NOFA will be set-aside for Homebuyer Assistance. This program activity may be used to provide assistance to eligible first time homebuyers for the acquisition or acquisition with rehabilitation of affordable single family housing by providing downpayment and closing cost assistance (including soft costs). If needed, rehabilitation must be provided for required accessibility modifications. Eligible homebuyers may receive loans up to $35,000 for downpayment, closing costs and rehabilitation. A maximum of $15,000 of the $35,000 loan may be used for downpayment and closing costs (including soft costs). The balance of the loan can be used for required accessibility modifications but cannot exceed $20,000.

b) As defined in 10 TAC §53.47(a)(2), the maximum award amount for HBA shall not exceed $300,000 per Applicant per NOFA; however, up to $500,000 may be awarded to HBA Applicants whose Service Area includes multiple counties within a Uniform State Service Region. In accordance with the 2008 Consolidated Plan-One Year Action Plan, up to six percent (6%) of the requested project funds may be requested for administrative costs.

c) As defined in 10 TAC §53.32(e), the maximum amount of assistance to an eligible Household for downpayment and closing cost assistance (including soft costs) is $15,000. As defined in 10 TAC §53.32(f), the maximum amount of assistance for rehabilitation to an eligible household that is also using funds for acquisition is $20,000.

d) The following first lien purchase loan requirements are imposed for households receiving Homebuyer Assistance:

i) No adjustable rate mortgage loans (ARMs) are allowed.

ii) No mortgages with a loan to value equal to or greater than 100% are allowed;

iii) No subprime mortgage loans are allowed;

iv) An origination fee and any other fee associated with the mortgage loan may not exceed 2% of the loan amount; and

v) The income ratio (back-end ratio) may not exceed 45%.

e) HBA assistance will be in the form of a 0% interest, five (5) or ten (10) year deferred, forgivable loan depending on the amount of assistance, creating a 2nd or 3rd lien with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

f) In accordance with 10 TAC §53.72(a)(2), the contract term for the HBA Program Activity shall not exceed 24 months and performance under the contract will be evaluated according to the following benchmarks:

i) 6 months, exempt administrative and environmental clearance must be complete for at least one Household to be assisted;

ii) 12 months, environmental clearance must be complete for at least 50% of the Households to be assisted, 50% of funds must be committed, 25% of funds drawn, and 25% of match supplied;

iii) 18 months, environmental clearance must be complete for at least 75% of the Households to be assisted, 75% of funds must be committed, 50% of funds drawn, and 50% of match requirement supplied; and

iv) 24 months, 100% of funds must be committed, 100% of funds drawn, and 100% of matched supplied.

g) A minimum threshold score of 12 is required in order to be considered for funding. The following threshold criteria listed in the subsection are mandatory requirements at the time of application submission unless specifically indicated otherwise and will be included in the written agreement, if awarded funds:

Table 1. Point Incentives for Income Targeting

Income Target	Points
0% to 29.99% of units at 60% AMFI	3
30% to 59.99% of units at 60% AMFI	7
60% to 100% of units at 60% AMFI	10

i) Affordable Housing Needs Score: Points range from zero (0) to seven (7), as published by the Department. Maximum 7 points.

ii) Income Targeting: In order to meet its annual goal of assisting very low to extremely low income families, the Department incentivizes application points for income targeting of households assisted The following table will be used to determine income targeting requirements and associated points. Maximum 10 points.

iii) Experience Providing Services to Persons with Disabilities: Applicants must have at least five (5) or more years providing services specifically targeting the needs of persons with disabilities as evidenced by previous contracts with funding entities for these services. To satisfy the requirement for this category, applicant may provide evidence of a partnership with an entity or organization that meets the requirement. Maximum 5 points.

iv) Experience Providing Homebuyer Assistance Service: Applying entity must have at least two (2) years experience providing homebuyer assistance services as evidenced by current or previous contracts with funding entities for these services. To satisfy the requirement for this category, applicant may provide evidence of a partnership with an entity or organization that meets this requirement. Maximum 5 points.

v) Cash Reserve: Each awarded applicant will be required to expend funds according to program guidelines and request funds from the Department for eligible expenses. Every Applicant must evidence the ability to administer the program and commit adequate cash reserves of at least $60,000 to facilitate administration of the program during the Department's disbursement process. Cash reserves are not permanently invested in the project but are used for short term deficits that are paid by program funds. Evidence of this commitment and the amount must be included in the Applicant's resolution.

vi) Resolution: All applications submitted must include an original resolution from the Applicant's direct governing body, authorizing the submission of the Application, commitment and the amount of cash reserves for use during the contract period, naming of a person and the person's title authorized to represent the organization and signature authority to execute a contract. If an Applicant that is a nonprofit organization is requesting a waiver of the grant application fee, they must do so in the resolution, and must state that the nonprofit organization offers expanded services such as child care, nutrition programs, job training assistance, health services, or human services. The resolution must be signed and dated within the six months preceding the application submission date.

vii) Description of Demand: It will be a threshold requirement to submit a narrative that describes in detail the demand evidenced for the proposed number of units to be assisted in the proposed service area. Source data, calculations and assumptions must be included.

viii) Homebuyer Counseling: It will be a threshold requirement for each applicant to submit the level of homebuyer counseling that will be provided. A minimum of 8 hours of homebuyer counseling must be provided. Evidence must include documentation describing the level of homebuyer counseling proposed, including post purchase counseling. Applicant must state who will provide the homebuyer counseling. A copy of the curriculum and a copy of the proposed written agreement for service provider (if the applicant is not providing the service) must also be provided.

ix) Plan for Identifying Accessibility needs of the Homebuyer. Applicant must submit a plan that clearly describes the process and expertise to be used in determining the accessibility needs of the homebuyer. The plan should include resumes of qualified/experienced staff or proposed agreement with a qualified/experienced third party company or agency.

9) Tenant-Based Rental Assistance (TBRA).

a) During the first one hundred eighty (180) days of this NOFA, approximately $750,000 of HOME Funds released under this NOFA will be set-aside for Tenant-Based Rental Assistance. This program activity may be used to provide eligible households rental subsidies, including security and utility deposits. In accordance with 24 CFR §92.216, not less than 90% of the households assisted with respect to TBRA or rental units, must have incomes at or below 60% of the AMFI, as defined by HUD.

b) During the first ninety (90) days of this NOFA, only applicants committing at least 50% of the proposed households to be assisted to persons transitioning from an institutional setting into a community placement or community setting may apply. After the first ninety (90) days, funds will be made available to any applicant under the TBRA set-side.

c) In accordance with 10 TAC §53.47(a)(3) the maximum award amount for TBRA shall not exceed $300,000 per Applicant per NOFA. In accordance with the 2008 Consolidated Plan-One Year Action Plan, up to six percent (6%) of the requested project funds may be requested for administrative costs. In accordance with 10 TAC §53.72(3) the contract term for TBRA shall not exceed 36 months, however, individual household assistance is limited to twenty-four (24) months.

d) Through the TBRA program, rental subsidy and security and utility deposit assistance is provided to tenants as a grant, in accordance with written tenant selection policies, for a period not to exceed twenty-four (24) months, which shall include among its objectives the securing of a permanent source of affordable housing on or before the expiration of the rental subsidy. Security deposits and utility deposits may be provided in conjunction with rental assistance. A security deposit cannot exceed two (2) months rent for the unit.

e) In accordance with 10 TAC §53.33, the household must comply with the following initial eligibility requirements: participate in an approved self-sufficiency program; maintain principal residency in the rental unit for which the subsidy is being provided; be an income eligible household; reside in a rental unit that is located within the Administrator's Service Area; meet the definition of persons with disabilities as defined by HUD; and meet all other eligibility requirements.

f) As defined in 10 TAC §53.33(d) the rental standard must not exceed HUD's "Fair Market Rent for the Housing Choice Voucher Program." Rental units must be inspected prior to occupancy and re-inspected annually, and must comply with Housing Quality Standards established by HUD.

g) In accordance with 10 TAC §53.72(a)(3), the contract term for the TBRA Program shall not exceed thirty-six (36) months and performance under the contract will be evaluated according to the following benchmarks:

i) six (6) months, exempt administrative environmental clearance must be complete and application intake complete for 30% for Households to be assisted;

ii) nine (9) months, application intake complete for 75% for Households to be assisted;

iii) twelve (12) months, 100% of funds must be committed to Households to be assisted and 25% of funds drawn;

iv) eighteen (18) months, 100% of funds already committed and 35% of funds drawn;

v) twenty-four (24) months, 100% of funds already committed and 50% of funds drawn; and

vi) thirty-six (36) months, 100% of funds already committed and 100% of funds drawn.

h) A minimum threshold score of ten (10) is required in order to be considered for funding. The following threshold criteria listed in the subsection are mandatory requirements at the time of application submission unless specifically indicated otherwise and will be included in the written agreement, if awarded funds:

i) Affordable Housing Needs Score: Points range from zero (0) to seven (7), as published by the Department. Maximum 7 points.

ii) Income Targeting: In order to meet its annual goal of assisting very low to extremely low income families, the Department incentivizes application points for income targeting of households assisted. The following table will be used to determine income targeting requirements and associated points. For those counties where the area median family income (AMFI) is at or below the state average median family income will receive the same number of points for income targeting when serving households at or below 50% AMFI as those counties exceeding the statewide median income targeting households at or below 30% AMFI. Maximum 20 points.

Table 2. Point Incentives for Income Targeting

Income Target	Points
0% to 29.99 % of units at 60% AMFI	1
30% to 59.99 % of units at 60% AMFI	3
60% to 100 % of units at 60% AMFI	5
0% to 29.99% of units at 30% AMFI	+6
30% to 59.99% of units at 30% AMFI	+11
60% to 100% of units at 30% AMFI	+15

iii) Experience Providing Services to Persons with Disabilities: Applicants must have at least 5 or more years providing services specifically targeting the needs of persons with disabilities as evidenced by previous contracts with funding entities for these services. To satisfy the requirement for this category, applicant may provide evidence of a partnership with an entity or organization that meets the requirement. Maximum 5 points.

iv) Experience Providing Rental Voucher Services: Applying entity must have at least two (2) years experience providing rental voucher services as evidenced by current or previous contracts with funding entities for these services. To satisfy the requirement for this category, applicant may provide evidence of a partnership with an entity or organization that meets this requirement. Maximum 5 points.

v) Cash Reserve: Each awarded applicant will be required to expend funds according to program guidelines and request funds from the Department for eligible expenses. Every Applicant must evidence the ability to administer the program and commit adequate cash reserves of at least one month of rent for the number of households proposed to serve as stated in the application to facilitate administration of the program during the Department's disbursement process. Cash reserves are not permanently invested in the project but are used for short term deficits that are reimbursed by program funds. Evidence of this commitment and the amount must be included in the Applicant's resolution.

vi) Resolution: All applications submitted must include an original resolution from the Applicant's direct governing body, authorizing the submission of the Application, commitment and amount of cash reserves for use during the contract period, naming of a person and the person's title authorized to represent the organization and signature authority to execute a contract. If an Applicant that is a nonprofit organization is requesting a waiver of the grant application fee, they must do so in the resolution, and must state that the nonprofit organization offers expanded services such as child care, nutrition programs, job training assistance, health services, or human services. The resolution must be signed and dated within the six months preceding the application submission date.

vii) Description of Demand: It will be a threshold requirement to submit a narrative that describes in detail the demand evidenced for the proposed number of units to be assisted in the proposed service area. Source data, calculations and assumptions must be included.

viii) TBRA Self Sufficiency Program: It will be a threshold requirement for each applicant to submit a proposed detailed Self Sufficiency

Plan and must describe the process for the transition of households to permanent affordable housing by the end of the 24-month rental assistance contract term.

(1) The documentation must describe the necessary components for the overall plan proposed for transition of potential tenants. This plan, like a case management plan, should detail the need of the tenant, how these needs will be addressed including any agreements with service providers who shall assist the tenant at meeting these needs, and a proposed timeframe for completing those activities. The plan must include:

(a) A sample household budget which will utilize existing sources of income such as employment, disability payments and other types of support that details how the assisted household will afford to be self-sufficient by the end of the 24-month rental assistance.

(b) If additional income is required to attain self-sufficiency, a plan for attaining the required education or training, or a job search plan must be included.

(c) Specific housing goals that will be completed on or before the end of the 24-month assistance period include: finding permanently subsidized housing, affordable market housing or other permanent housing solutions. The plan should include the required steps such as completing an application, approximate waiting time to get into the type of housing desired and the cost of the housing to the tenant.

10) Review Process.

a) Pursuant to 10 TAC §53.48(a), each application will be handled on a first-come, first-served basis as further described in this section. Each application will be assigned a "received date" based on the date and time it is physically received by the Department. Then each application will be reviewed on its own merits as applicable. Applications will continue to be prioritized for funding based on their "received date". Applications will be reviewed for applicant and activity eligibility, and threshold criteria as described in this NOFA.

i) The Department will ensure review of materials required under the NOFA and Application Submission Procedures Manual (ASPM) and will issue a notice of any Administrative Deficiencies within 45 days of the received date. Applications with Administrative Deficiencies not cured within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase will be reviewed for recommendation to the Board by the Committee.

ii) Because Applications are processed in the order they are received by the Department, it is possible that the Department will expend all available HOME funds before an Application has been completely reviewed. If on the date an Application is received by the Department, no funds are available under this NOFA, the Applicant will be notified that no funds exist under the NOFA and the Application will not be processed

b) Pursuant to 10 TAC §53.42 if a submitted Application has an entire Volume of the application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department, will be terminated without being processed as an Administrative Deficiency.

c) The Department may decline to consider any Application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Applications that are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department reserves the right to negotiate individual elements of any Application

d) All Applicants will be processed through the Department's Application Evaluation System, and will include a previous award and past performance evaluation. Poor past performance may disqualify an Applicant for a funding recommendation or the recommendation may include conditions.

e) Funding recommendations of eligible Applicants will be presented to the Department's Governing Board of Directors based on eligibility and limited by the total amount of funds available under this NOFA and the maximum award amount.

f) In accordance with §2306.082, Texas Government Code and 10 TAC §53.6, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at 10 TAC §1.17

g) An Applicant may appeal decisions made by staff in accordance with 10 TAC §1.7.

11) Application Submission.

a) All applications submitted under this NOFA must be received on or before 5:00 p.m. on Friday, May 29, 2009, regardless of method of delivery.

b) The Department will accept applications from 8 a.m. to 5 p.m. each business day, excluding federal and state holidays from the date this NOFA is published on the Department's web site until the deadline. Question regarding this NOFA should be addressed to:

HOME Division

221 E. 11th Street

Austin, Texas 78701

Telephone: (512) 463-8921

E-mail: HOME@tdhca.state.tx.us

c) All applications must be submitted, and provide all documentation, as described in this NOFA and associated application materials.

d) Applicants must submit one complete printed copy of all Application materials and one complete scanned copy of the Application materials as detailed in the Application Submission Procedures Manual (ASPM). All scanned copies must be scanned in accordance with the guidance provided in the ASPM.

e) All Application materials including manuals, NOFA, program guidelines, and all applicable HOME rules, will be available on the Department's website at www.tdhca.state.tx.us. Applications will be required to adhere to the HOME Rule and threshold requirements in effect at the time of the Application submission. Applications must be on forms provided by the Department, and cannot be altered or modified and must be in final form before submitting them to the Department.

f) Applicants are required to remit a non-refundable Application fee payable to the Texas Department of Housing and Community Affairs in the amount of $30 per Application. Payment must be in the form of a check, cashier's check or money order. Do not send cash. Per §2306.147(b), Texas Government Code requires the Department to waive Application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. These organizations must include proof of their exempt status and a description of their supportive services in lieu of the Application fee. The Application fee is not an allowable or reimbursable cost under the HOME Program.

g) This NOFA does not include text of the various applicable regulatory provisions that may be important to the HOME Program. For proper completion of the application, the Department strongly encourages potential applicants to review the State and Federal regulations, and contact the HOME Division for guidance and assistance.

h) Application Workshop: the Department will present application workshops in locations throughout the State which will provide an overview of the HOME Program Activities eligible under this NOFA and will also provide Application preparation and submission requirements, evaluation criteria, and state and federal program information. The Application workshop schedule and registration will be posted on the Department's website at www.tdhca.state.tx.us

i) Audit Requirements: An applicant is not eligible to apply for funds or any other assistance from the Department unless a past audit or Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance per 10 TAC §1.3(b). This is a threshold requirement outlined in the application, therefore applications that have outstanding past audits will be disqualified. Staff will not recommend applications for funding to the Department's Governing Board unless all unresolved audit findings, questions or disallowed costs are resolved per 10 TAC §1.3(c).

j) Applications must be sent via overnight delivery to:

Texas Department of Housing and Community Affairs

HOME Division

221 East 11th Street

Austin, TX 78701-2410

or via the U.S. Postal Service to:

Texas Department of Housing and Community Affairs

HOME Division

Post Office Box 13941

Austin, TX 78711-3941

NOTE: This NOFA does not include the text of the various applicable regulatory provisions that may be important to the particular HOME Program. For proper completion of the application, the Department strongly encourages potential applicants to review all applicable State and Federal regulations.

TRD-200804912
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: September 10, 2008

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Housing Trust Fund Rental Production Program Notice of Funding Availability (NOFA)

1) Summary.

The Texas Department of Housing and Community Affairs ("the Department") announces the availability of approximately $2,594,000 in funding from the Housing Trust Fund for financing of affordable rental housing for very low-income and extremely low-income Texans. The availability and use of these funds is subject to the state Housing Trust Fund Rule at Title 10 Texas Administrative Code (10 TAC) Chapter 51 ("HTF Rules") and Chapter 2306, Texas Government Code in effect at the time an application is submitted. Applicants are encouraged to familiarize themselves with all of the applicable rules that govern the program.

2) Allocation of Housing Trust Funds.

a) These funds are made available through 2008 and 2009 General Revenue Funds and local revenues appropriated to the Housing Trust Fund during the 80th Legislative Session for financing rental housing developments which involve new construction, rehabilitation or acquisition and rehabilitation. All funds released under this NOFA are to be used for the subsidizing of affordable rental housing units that target very low-income Texans earning 50% or less of Area Median Family Income (AMFI). Additionally, if the funds are used to target extremely low-income Texans earning 30% or less of the AMFI and those units are not designated to serve extremely low-income households through another subsidy source with the exception of developments with existing and continuing USDA 515 program loans and rental assistance or project-based Section 8, the Department may allow a forgivable loan only for those extremely low-income units.

b) In accordance with 10 TAC §51.8, this NOFA will be an Open Application Cycle and funding will be available on a first-come, first-served statewide basis. Applications will be accepted until 5:00 p.m. April 6, 2009 unless all funds are committed prior to this date. Applicants are encouraged to review the application process cited above and described herein. Applications that do not meet minimum threshold and financial feasibility will not be considered for funding.

c) The Department will allocate Housing Trust Fund awards as a loan, to eligible recipients for the provision of housing for very low and extremely low-income individuals and families. The Department's underwriting guidelines at 10 TAC §1.32 will be used which set as a minimum feasibility a 1.15 debt coverage ratio.

d) Award amounts are limited to no more than $500,000 per development.

e) Developments involving rehabilitation must establish that the rehabilitation will substantially improve the condition of the housing and will involve at least $12,000 per unit in direct hard costs, unless the property is also being financed by the United States Department of Agriculture's Rural Development program.

3) Eligible and Ineligible Activities and Restrictions.

a) Eligible activities will include the financing, new construction, acquisition and/or rehabilitation of affordable rental housing developments.

b) If an application is determined ineligible pursuant to §51.5(d)(9), the application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibility will be included in the termination letter to the Applicant.

c) Restrictions include the displacement of existing affordable housing. Pursuant to §2306.203(a)(4) of the Texas Government Code, Housing

Trust Funds shall not be utilized on a development that has the effect of permanently and involuntarily displacing low, very low, and extremely low income persons and families. Low-Income persons who may be temporarily displaced by the rehabilitation of affordable housing may be eligible for compensation of moving and relocation expenses. If a Housing Trust Fund recipient violates the permanent dislocation provision of this subsection, that recipient risks loss of Housing Trust Funds and the landlord/developer must pay the affected tenant's costs and all moving expenses.

4) Eligible and Ineligible Applicants.

a) The Department provides HTF to qualified local units of government, public housing authorities, nonprofit organizations and for-profit entities.

b) Ineligible Applicants will include the following:

i) Previously funded recipient(s) whose Housing Trust Funds have been partially or fully deobligated due to failure to meet contractual obligations during the 12 months prior to the current funding cycle;

ii) Applicants, or persons affiliated with the Applicant that have been barred, suspended, or terminated from procurement in a state or federal program and listed in the List of Parties Excluded from Federal Procurement of Non-procurement Programs;

iii) Applicants or persons affiliated with the Applicant that are subject of enforcement action under state or federal securities law, or are the subject of an enforcement proceeding with a state or federal agency or another governmental entity;

iv) Applicants or persons affiliated with the Applicant that have unresolved audit findings related to previous or current funding agreements with the Department;

v) Applicants or persons affiliated with the Applicant that have delinquent loans, fees or other commitments with the Department, until payment is made;

vi) Applicants who have not satisfied all threshold requirements described in this title, and the NOFA to which they are responding, and for which Administrative Deficiencies were unresolved;

vii) Applicants who have submitted incomplete Applications;

viii) Applicants or persons affiliated with the Applicant that have been otherwise barred by the Department;

ix) Applicants are subject to 10 TAC §1.13; or

x) Applicants or persons affiliated with the Applicant that have breached a contract with a public agency.

c) Each Application will be reviewed for its compliance history by the Department, consistent with 10 TAC Chapter 60. Applicants, or persons affiliated with an Application, found to have a Development or Contract in Material Noncompliance with the Department, will have their Application(s) terminated.

5) Affordability Requirements.

a) Pursuant to §2306.203(6) of the Texas Government Code, Applicants proposing multifamily housing, new construction or rehabilitation, will be required to guarantee the Development will remain affordable to income qualified families or individuals for a period of twenty (20) years.

b) Properties will be restricted under a Land Use Restriction Agreement ("LURA"), or other such instrument as determined by the Department for these terms. Among other restrictions, the LURA may require the owner of the property to continue to accept subsidies which may be offered by the federal government, prohibit the owner from exercising an option to prepay a federally insured loan, impose tenant income-based occupancy and rental restrictions, or impose any of these and other restrictions as deemed necessary at the sole discretion of the Department in order to preserve the property as affordable housing on a case-by-case basis.

6) Site and Development Restrictions.

a) Housing that is constructed or rehabilitated with HTF funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances at the time of project completion. In the absence of local codes applications will be required to meet Texas Minimum Construction Standards, as well as the Fair Housing Accessibility Standards and §504 of the Rehabilitation Act of 1973. Developments must also meet all local building codes or standards that may apply.

b) Housing must meet the accessibility requirements at 24 CFR Part 8, which implements §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and covered multifamily dwellings, as defined at 24 CFR §100.201, must also meet the design and construction requirements at 24 CFR §100.205, which implement the Fair Housing Act (42 U.S.C. §§3601 - 3619). Any Developments designed as single family structures must also satisfy the requirements of §2306.514, Texas Government Code.

7) Threshold Criteria.

a) Housing units subsidized by HTF funds must be affordable to very-low (50% AMFI or below) or extremely low-income (30% AMFI or below) persons. Mixed Income rental developments may only receive funds for units that serve very-low or extremely low-income persons. All applications intended to serve persons with disabilities must adhere to the Department's Integrated Housing Rule at 10 TAC §1.15.

b) The Recipient must establish a reserve account consistent with §2306.186, Texas Government Code, and as further described in 10 TAC §1.37.

c) The following Threshold Criteria listed in this subsection are mandatory requirements at the time of Application submission unless specifically indicated otherwise. Applicants must demonstrate the application can meet the following threshold criteria to be considered for funding:

i) The application is consistent with the requirements established in the HTF rules and the NOFA.

ii) The Applicant provides evidence of its ability to carry out the proposal in the areas of financing, acquiring, rehabilitating, developing or managing an affordable housing development.

iii) To encourage the inclusion of families and individuals with the highest need for affordable housing, applicants must target units for individuals or families earning 50% or less of area median family income for the development site. Additionally, 10% of the total units in the proposed development must be designated as HTF units. Developments with existing and continuing USDA 515 program loans and rental assistance or project-based Section 8 are exempt from this minimum targeting requirement.

iv) An applicant is not eligible to apply for funds or any other assistance from the Department unless audits are current at the time of application or the Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance per 10 TAC §1.3(b).

v) All of the current Qualified Allocation Plan and Rules in effect at the time of application submission at 10 TAC §50.9(h), excluding subsections (11), (12), and (15).

8) Review Process.

a) Pursuant to 10 TAC §51.8, each application will be handled on a first-come, first-served basis as further described in this section. Each application will be assigned a "Received Date" based on the date and time it is physically received by the Department. Then each application will be reviewed on its own merits in two review phases, as applicable. Applications will continue to be prioritized for funding based on their "Received Date" unless they do not proceed into the next phase(s) of review. Applications proceeding in a timely fashion through a phase will take priority over applications that may have an earlier "Received Date" but that did not timely complete a phase of review. Applications will be reviewed for Applicant and Activity Eligibility, Threshold Criteria, and Financial Feasibility as described in this NOFA.

Phase One will begin as of the Received Date and will include a review of eligibility and threshold criteria and all Application requirements. The Department will ensure review of materials required under the NOFA and ASPM and will issue a notice of any Administrative Deficiencies for threshold criteria and eligibility within forty-five (45) days of the Received Date. Applicants who are able to resolve their Administrative Deficiencies within five (5) business days will be forwarded into Phase Two, if applicable, and will continue to be prioritized by their Received Date. Applications with Administrative Deficiencies not cured within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase and do not require additional review in Phase Two will be reviewed for recommendation to the Board by the Committee.

Phase Two will include a comprehensive review for financial feasibility for Development Activities. Financial feasibility reviews will be conducted by the Real Estate Analysis (REA) Division consistent with 10 TAC §1.32. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. The Department will issue a notice of any Administrative Deficiencies within 45 days of the date the Application enters Phase Two. Applications with Administrative Deficiencies not satisfied within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase will be reviewed for recommendation to the Board by the Committee.

Because applications are processed in the order they are received by the Department, it is possible that the Department will expend all available Housing Trust Fund funds before an application has completed all phases of review. In the case that all Housing Trust Fund funds are committed before an application has completed all phases of the review process, the Department will notify the applicant that their application will remain active for ninety (90) days in its current phase. If new Housing Trust Fund funds become available, Applications will continue onward with their review without losing their Received Date priority. If Housing Trust Fund funds do not become available within ninety (90) days of the notification, the Applicant will be notified that their Application is no longer under consideration. The applicant must reapply to be considered for future funding. If on the date an Application is received by the Department, no funds are available under the NOFA, the applicant will be notified that no funds remain under the NOFA and that the application will not be processed.

b) If a submitted Application has an entire Volume of the application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department, the Application will be terminated without being processed as an Administrative Deficiency.

c) Pursuant to 10 TAC §51.8(e), a site visit will be conducted as part of the HTF Program development feasibility review. Applicants must receive recommendation for approval from the Department to be considered for HTF funding by the Board.

d) The Department may decline to consider any Application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Applications which are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department strives, through its loan terms, to securitize its funding while ensuring the financial feasibility of a Development. The Department reserves the right to negotiate individual elements of any Application.

e) In accordance with §2306.082 Texas Government Code and 10 TAC §51.8(g), it is the Department's policy to encourage the use of appropriate Alternative Dispute Resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at 10 TAC §1.17.

f) An Applicant may appeal decisions made by staff in accordance with 10 TAC §1.7.

9) Application Submission.

a) All applications submitted under this NOFA must be received on or before 5:00 p.m. on April 6, 2009. The Department will accept applications from 8 a.m. to 5 p.m. each business day, excluding federal and state holidays from the date this NOFA is published on the Department's web site until the deadline. For questions regarding this NOFA please contact Barbara Skinner at 512-475-1643 or via e-mail at barbara.skinner@tdhca.state.tx.us.

b) If an Application is submitted to the Department for a Development that requests funds from two separate housing finance programs, and only one of the housing finance programs is operated as a competitive cycle, the Application will be handled in accordance with the guidelines for each housing program. The Applicant is responsible for adhering to the deadlines and requirements of both programs. If an Application is submitted for two separate housing finance programs where both programs are either open cycle, or competitive, the Application will be handled in accordance with the guidelines of each housing program. The Applicant is responsible for adhering to the deadlines and requirements of both programs.

c) Applications submitted to the Department must be complete and include all support documentation and associated application materials as described in this NOFA.

d) Applicants must submit two complete printed copies of all Application materials as detailed in the 2008 Application Submission and Procedure Manual (ASPM) for Housing Trust Fund.

e) The application consists of three parts: bound items, unbound items and electronic submission. A complete application for each proposed development must be submitted. Incomplete applications or improperly bound applications will not be accepted. The bound volumes of the application must be bound using red pressboard binders. Each volume

must be submitted in a separate red pressboard binder. If the required documentation for a volume exceeds the capacity of one binder, a second binder may be used to subdivide the volume.

f) If third party reports are not received at the time of application submission, the Application will be terminated.

g) Application materials including manuals, NOFA, program guidelines, and applicable Housing Trust Fund rules, will be available on the Department's website at www.tdhca.state.tx.us. Applications will be required to adhere to the Housing Trust Fund Rule and threshold requirements in effect at the time of the Application submission. Applications must be on forms provided by the Department, and cannot be altered or modified and must be in final form before submitting them to the Department.

h) Applicants are required to remit a non-refundable Application fee payable to the Texas Department of Housing and Community Affairs in the amount of $200.00 per Application. Payment must be in the form of a check, cashier's check or money order. Do not send cash. Section 2306.147(b) of the Texas Government Code requires the Department to waive Application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. These organizations must include proof of their exempt status and a description of their supportive services in lieu of the Application fee.

i) Applications must be sent via overnight delivery to:

HOME Division

Texas Department of Housing and Community Affairs

Attn: Barbara Skinner

221 East 11th Street

Austin, TX 78701-2410

or via the U.S. Postal Service to:

HOME Division

Texas Department of Housing and Community Affairs

Attn: Barbara Skinner

Post Office Box 13941

Austin, TX 78711-3941

NOTE: This NOFA does not include the text of the various applicable regulatory provisions that may be important to the particular Housing Trust Fund Program. For proper completion of the application, the Department strongly encourages potential applicants to review all applicable State and Federal regulations.

TRD-200804913
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: September 10, 2008

♦ ♦ ♦

Notice of Public Hearing

Multifamily Housing Revenue Bonds (Woodmont Apartments) Series 2008

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Clifford Davis Elementary School, 4400 Campus Drive, Fort Worth, Texas 76119, at 6:00 p.m. on October 8, 2008, with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $18,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Woodmont Apartments, Ltd., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development (the "Development") described as follows: 252-unit multifamily residential rental development located at approximately the northeast corner of Oak Grove Road and Loop 820, Fort Worth, Tarrant County, Texas. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200804754
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: September 3, 2008

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by FOX INSURANCE COMPANY, a foreign life company. The home office is in Scottsdale, Arizona.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200804919
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: September 10, 2008

♦ ♦ ♦

Texas Judicial Council

Request for Applications - FY 2009 Formula Grant Program

Task Force on Indigent Defense

Visit website at www.courts.state.tx.us/tfid for more information.

Contact: Whitney Stark, Grants Administrator

Telephone: (512) 936-6996

TRD-200804763
James Bethke
Director
Texas Judicial Council
Filed: September 4, 2008

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1102 "Cash Bingo"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1102 is "CASH BINGO". The play style is "bingo".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1102 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1102.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: B01, B02, B03, B04, B05, B06, B07, B08, B09, B10, B11, B12, B13, B14, B15, I16, I17, I18, I19, I20, I21, I22, I23, I24, I25, I26, I27, I28, I29, I30, N31, N32, N33, N34, N35, N36, N37, N38, N39, N40, N41, N42, N43, N44, N45, G46, G47, G48, G49, G50, G51, G52, G53, G54, G55, G56, G57, G58, G59, G60, O61, O62, O63, O64, O65, O66, O67, O68, O69, O70, O71, O72, O73, O74, O75, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, FREE SYMBOL, TRY AGAIN SYMBOL, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00 and $100.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1102 - 1.2D

PLAY SYMBOL	CAPTION
B01	
B02	
B03	
B04	
B05	
B06	
B07	
B08	
B09	
B10	
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B12	
B13	
B14	
B15	
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I17	
I18	
I19	
I20	
I21	
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I24	
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68	
69	

70	
71	
72	
73	
74	
75	
FREE	
TRY AGAIN	TRY AGAIN
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $3.00, $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1102), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1102-0000001-001.

K. Pack - A pack of "CASH BINGO" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASH BINGO" Instant Game No. 1102 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CASH BINGO" Instant Game is determined once the latex on the ticket is scratched off to expose 131 (one hundred thirty-one) play symbols. The player must scratch off the "CALLER'S CARD" area to reveal 24 (twenty-four) Bingo Numbers and 6 (six) Bonus Numbers. The player must scratch all the Bingo Numbers on cards 1 through 4 that match the Bingo Numbers and the Bonus Numbers on the "CALLER'S CARD". Each "CARD" has a corresponding prize box. Players win by matching those same numbers on the four Bingo Cards. If the player matches all bingo numbers in a complete horizontal, vertical or diagonal line, the four corners of the grid, or an X pattern, they win the prize shown in the corresponding prize box. Examples of play: If a player matches all bingo numbers plus the Free Space in a complete horizontal, vertical or diagonal line pattern in any one card, the player wins the prize shown in the corresponding prize box. If the player matches all bingo numbers in all four (4) corners in any one card, the player wins the prize shown in the corresponding prize box. If the player matches all bingo numbers plus Free Space to make a complete "X" pattern in any one card, the player wins the prize shown in the corresponding prize box. In the INSTANT BONUS play area, if a player reveals a prize amount, the player wins that amount instantly! The player can only win one prize per "CARD". No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 131 (one hundred thirty-one) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 131 (one hundred thirty-one) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 131 (one hundred thirty-one) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 131 (one hundred thirty-one) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The CALLING AREA is defined as the combined areas of the CALLER'S CARD and the BONUS NUMBERS.

C. No duplicate CALLING AREA play symbols.

D. The CALLING AREA will have a minimum of three (3) numbers from each letter (B, I, N, G and O) letter range.

E. The CALLING AREA will have a maximum of eight (8) numbers from each letter (B, I, N, G and O) letter range.

F. Each number in the CALLING AREA will appear on at least one of the BINGO CARDS.

G. There will be one (1) FREE symbol per card fixed in the center of each BINGO CARD.

H. No duplicate BINGO CARDS (same symbols in same position) on a ticket.

I. Non-winning BINGO CARDS will have a minimum of three (3) numbers called.

J. All numbers within each BINGO CARD will be unique.

K. There can be only one winning pattern on each BINGO CARD on winning cards.

L. A "near win" is a winner less one (1) number, except "X" where there are two (2) numbers less (one from each diagonal line, one of which must be from a corner).

M. The non-winning INSTANT BONUS box will always contain the TRY AGAIN symbol.

N. The winning INSTANT BONUS box will contain one (1) prize symbol per the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASH BINGO" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASH BINGO" Instant Game prize of $1,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CASH BINGO" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is

not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CASH BINGO" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CASH BINGO" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 30,000,000 tickets in the Instant Game No. 1102. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1102 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	1,980,000	15.15
$3	2,160,000	13.89
$5	1,440,000	20.83
$10	360,000	83.33
$15	120,000	250.00
$20	240,000	125.00
$30	60,750	493.83
$50	82,500	363.64
$100	30,000	1,000.00
$500	2,500	12,000.00
$1,000	65	461,538.46
$30,000	30	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.63. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1102 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1102, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804914
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 10, 2008

♦ ♦ ♦

Nortex Regional Planning Commission

Request for Proposals

Nortex Regional Planning Commission is requesting proposals from qualified firms of certified public accountants to audit its financial statements for the fiscal year ending September 30, 2008, with the option of auditing its financial statements for each of the three subsequent fiscal years. These audits are to be performed in accordance with generally accepted auditing standards as set forth by the American Institute of Certified Public Accountants, OMB Circular A-133, and the State of Texas Single Audit Circular.

To obtain copies of this Request for Proposal, please contact James Springer, Nortex Regional Planning Commission, P.O. Box 5144, Wichita Falls, Texas 76307, telephone (940) 322-5281. A bidder's conference is scheduled for September 26, 2008, 10:00 a.m., CST, at the offices of Nortex Regional Planning Commission, 4309 Jacksboro Highway, Wichita Falls, Texas 76302 to answer any and all questions. All proposals must be received no later than 4:30 p.m., CST, on October 3, 2008. Proposals received after the specified date and time will not be considered.

TRD-200804768
Dennis Wilde
Executive Director
Nortex Regional Planning Commission
Filed: September 4, 2008

♦ ♦ ♦

North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the June 27, 2008 issue of the *Texas Register* (33 TexReg 5072). The selected consultant will perform technical and professional work to conduct the Fort Worth Transportation Authority and Denton County Transportation Authority On-Board Transit Survey.

The consultant selected for this project is Nustats LLC, 206 Wild Basin Road, Building A, Suite 300, Austin, Texas 78746. The maximum amount of this contract is $245,000.

TRD-200804875
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: September 9, 2008

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Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on City of Austin, Public Works Division, Solid Waste Department's application for a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel from Onion Creek in Travis County at a location approximately 2.86 miles downstream from the Highway 71 crossing of Onion Creek and approximately 1.09 miles upstream from the Highway 183 crossing of Onion Creek.

The hearing will be held at 10:00 a.m. on Tuesday, October 14, 2008 at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744.

The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Beth Hilliard, TPWD, by mail: 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4482; or e-mail: beth.hilliard@tpwd.state.tx.us.

TRD-200804915
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: September 10, 2008

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 28, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Marcus Cable Associates, LLC d/b/a Charter Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36086, before the Public Utility Commission of Texas.

The requested amended CFA service area includes the Town of Hickory Creek, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36086.

TRD-200804773
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 5, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 3, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36103 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the municipality of Helotes, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36103.

TRD-200804897
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 4, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Frontier Utilities, Inc. for Retail Electric Provider (REP) Certification, Docket Number 36106 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 26, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36106.

TRD-200804899
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 4, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Our Energy LLC for Retail Electric Provider (REP) Certification, Docket Number 36107 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 26, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36107.

TRD-200804900
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 5, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Pulse Electric, Inc. for Retail Electric Provider (REP) Certification, Docket Number 36119 before the Public Utility Commission of Texas.

Applicant's requested service area includes the geographic area of the Electric Reliability Council of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 26, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36119.

TRD-200804901
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 5, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Energy Plus Holdings LLC for Retail Electric Provider (REP) Certification, Docket Number 36120 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 26, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36120.

TRD-200804902
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 5, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Weir Investments for Retail Electric Provider (REP) Certification, Docket Number 36121 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 26, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36121.

TRD-200804903
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 29, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of four thousand block of numbers in the Fort Worth rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36094.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 24, 2008. Hearing and speech impaired individuals with text telephones (TTY) may contact

the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36094.

TRD-200804774
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 5, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on September 2, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of one thousand block of numbers in the Leander rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36098.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 24, 2008. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36098.

TRD-200804775
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 5, 2008

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The Texas A&M University System

Request for Proposal

RFP01 RSK-9-001 Health, Benefit, Retirement, and Workmans' Compensation Consultant

The Texas A&M University System is accepting proposals and intends to enter into an Agreement with a consultant to assist with management of the A&M System's health, benefit, retirement, and Workers' Compensation (WCI) insurance plans.

The Request for Proposal documentation may be obtained by contacting: Don Barwick, HUB and Procurement Manager, System Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste. 1267, College Station, Texas 77845 or e-mail at dbarwick@tamu.edu.

The Texas A&M University System Office of Risk Management requires the services of an outside consultant with the experience, expertise, and contacts to assist with request for proposal development, contract negotiations, vendor implementation, vendor audits, and access to information, data, and advice regarding health, benefit, retirement, and WCI issues and legislative changes.

The A&M System will base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

Proposals must be received on or before 2:00 p.m. CDT on October 7, 2008.

TRD-200804871
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: September 8, 2008

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Architectural/Engineering Services

The City of Grand Prairie, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional architectural/engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation architectural engineering design services described below:

Airport Sponsor: City of Grand Prairie. TxDOT CSJ No. 08CTGNDPR. Scope: Provide architectural/engineering services to design and construct an air traffic control tower and associated appurtenances at Grand Prairie Airport.

There is no DBE goal for the project. TxDOT Project Manager is Michelle Hannah.

To assist in your proposal preparation the criteria, 5010 drawing, and most recent airport layout plan are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting "Grand Prairie Municipal Airport."

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Architectural/Engineering Services Proposal". The form may be requested from TxDOT, Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at

www.txdot.gov/services/aviation/consultant.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 10, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating architectural/engineering proposals for this project are attached below. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager at 1-800-68-PILOT at extension 4518. For technical questions, please contact Michelle Hannah, at 1-800-68-PILOT at extension 4539.

CRITERIA FOR EVALUATING ARCHITECT/ENGINEER PROPOSALS:

TxDOT Aviation recommends that the selection committee, in evaluating detailed proposals from the listed architects/engineers, use the following criteria. They should suffice for most projects. The department has proposed scoring values for each criterion. Should there be special circumstances, criteria and their respective scoring values may be adjusted. Your TxDOT project manager will be glad to help should this be the case.

1. Recent experience of the project team with comparable building projects within the last five years. (20 points)

Does the proposal indicate that the project team has recent direct experience on other general aviation airports designing similar improvements to those proposed at this location? (Sources of information: Aviation Project Design Team Form, Recent Relevant Airport Experience Form, and possibly the Proposal Summary.)

2. Proposed technical approach (20 points)

Does the architect/engineer provide evidence of understanding of the project; and any unique architectural or engineering aspects associated with the proposed project and how to address them? (Sources of information: Proposed Technical Approach to Project, and possibly the Proposal Summary.)

3. Ability to meet schedules and deadlines (20 points)

Does the proposed design team have sufficient time to work on this project? Has the firm demonstrated an ability to meet design schedules in the past? (Sources of information: Aviation Project Design Team Form, Recent Relevant Airport Experience Form, and possibly the Proposal Summary.)

4. Project design schedule (20 points)

Reasonableness of proposed schedule (Sources of information: Project Design Schedule Form and possibly the Proposal Summary.)

5. Construction Management Experience (20 points)

It is critical that the architect/engineer be involved in construction activities through frequent contact with the contractor and by making periodic site visits. What evidence does the proposal provide as to the architect's/engineer's commitment to proactive and consistent attention to the project during construction? (Source of information: Relevant Airport Experience form; proposed Technical Approach to Project; and possibly the Proposal Summary.)

TRD-200804892
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 9, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Haskell, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Haskell Municipal Airport during the course of the next five years through multiple grants.

Current Project: City of Haskell. TxDOT CSJ No.: 0808HSKEL. Engineering/design services for: Replace threshold lights RW 18-36 and rotating beacon & tower. Rehabilitate parallel TW, stub TW; hangar access TWs; apron; and RW 18-36. Mark RW 18-36 and install signage.

The DBE goal for the current project is **10%+**. TxDOT Project Manager is Clayton Bridwell.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Replace MIRLs

2. Widen RW 18-36

3. Extend parallel TW to RW 18 end

The City of Haskell reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting "Haskell Municipal Airport". The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at www.txdot.gov/services/aviation/consultant.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 10, 2008, at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Delia Lopez Molina.

The consultant selection committee will be composed of Aviation Division staff members and one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at

http://www.txdot.gov/services/aviation/consultant.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Delia Lopez Molina. For technical questions, please contact Clayton Bridwell, Project Manager.

TRD-200804891
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 9, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

Menard County, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at Menard County Airport during the course of the next five years through multiple grants.

Current Project: Menard County. TxDOT CSJ No.: 0907MENRD. **Scope**: Rehabilitate stub taxiway; install game proof fence; rehabilitate, stripe, and mark Runway 15-33; rehabilitate turnarounds; install segmented circle and windcone; install PAPI-2 Runway 15-33; replace LIRL with MIRL; and rehabilitate apron at Menard County Airport.

The HUB Participation Goal for the current project is 10%. TxDOT Project Manager is Charles Graham.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Pave auto parking

Menard County reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, and project narrative are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting "Menard County Airport" The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at

www.txdot.gov/services/aviation/consultant.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 10, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation engineering proposals can be found at

http://www.txdot.gov/services/aviation/consultant.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Edie Stimach, Grant Manager. For technical questions, please contact Charles Graham, Project Manager.

TRD-200804893
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 9, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Stamford, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Arledge Field during the course of the next five years through multiple grants.

Current Project: City of Stamford. TxDOT CSJ No.: 0908STAMF. Scope: Replace rotating beacon and tower; install lighted windcone; replace MIRL Runway 17-35; and install signage at Arledge Field Airport.

There is no DBE participation requirement for the current project. TxDOT Project Manager is Russell Deason.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Reconstruct apron
2. Overlay and mark Runway 17-35
3. Construct and mark taxiway to Runway 17
4. Overlay and mark stub taxiways
5. Construct turnaround Runway 35
6. Update Airport layout Plan
7. Install Jet A fuel system
8. Construct Terminal building

The City of Stamford reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting "Arledge Field". The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at

www.txdot.gov/services/aviation/consultant.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 17, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at

http://www.txdot.gov/services/aviation/consultant.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Edie Stimach, Grant Manager. For technical questions, please contact Russell Deason, Project Manager.

TRD-200804894
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 9, 2008

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Extension of Comment Deadline - Public Notice of FEIS (Grand Parkway Segment F-2), Harris County

In the August 8, 2008, issue of the *Texas Register* (33 TexReg 6468), the Texas Department of Transportation published Public Notice of FEIS (Grand Parkway Segment F-2), Harris County. The deadline date for submittal of comments has been changed and extended. The following notice is re-published with the new deadline.

Pursuant to 43 Texas Administrative Code §2.5(e)(8)(B), the Texas Department of Transportation is advising the public of the availability of the Final Environmental Impact Statement (FEIS) for the proposed construction of State Highway 99, SH 249 to IH 45 (the Grand Parkway Segment F-2) northwest of Houston in Harris County, Texas. Comments regarding the FEIS may be submitted via e-mail to: segmentf2comments@grandpky.com or to The Grand Parkway Association, Attention: Segment F-2 Comments, 4544 Post Oak Place, Suite 222, Houston, Texas 77027 or the Director of Project Development at the Texas Department of Transportation's Houston District Office, 7600 Washington Avenue, Houston, Texas. **Comments are due by 5:00 p.m. on November 7, 2008**. The Texas Department of Transportation's (department) mailing address is P.O. Box 1386, Houston, Texas 77251-1386.

The purpose of the proposed action is to provide improved access to the existing and future thoroughfare system, reduce area traffic congestion, improve safety, and improve area-wide mobility. A full range of alternatives were identified and evaluated for Segment F-2 at the corridor level (five corridors), transportation mode level (No Build, Transportation System Management Alternatives, Travel Demand Alternatives, and Modal Alternatives), and at the alignment level. The proposed ac-

tion consists of the construction of a controlled access tollway from SH 249 to IH 45 in Harris County, a distance ranging from 12.0 to 13.0 miles, depending on the alternative alignment considered. The proposed facility will consist of a four-mainlane controlled access tollway within a 400-foot (right of way) width. A total of seven build alternative alignments, in addition to the No-Build alternative, have been presented in the FEIS. All seven alternative alignments lie between SH 249 and IH 45 in a west-east direction and begin approximately 0.2 miles south of Boudreaux Road. Alternative Alignment A traverses mainly through the center of the study area. This alignment alternative terminates at IH 45, approximately 0.6 miles north of Spring Stuebner Road and is 12.5 miles in length. Alternative Alignment B traverses mainly through the southern portion of the study area. Alternative Alignment B terminates approximately 0.1 miles south of the Hardy Toll Road and IH 45 intersection and is 13.0 miles in length. Alternative Alignment C passes through the north and middle portion of the study area. Alternative Alignment C terminates at the same location as Alternative Alignment A and is 12.2 miles in length. Alternative Alignment D passes through the middle of the study area from Boudreaux Road approximately 0.3 mile northeast of FM 2920 for approximately 7.0 miles before ending at the same location as Alternative Alignment C and is 12.0 miles in length. Alternative Alignment E passes through the northern portion of the study area where it ends at the same location as Alternative Alignment B and is 12.5 miles in length. Alternative Alignment F passes through the northern portion of the study area before ending at the same location as Alternative Alignment C and is 12.1 miles in length.

The preferred corridor and transportation mode and the recommended alternative alignment, as presented in the Draft Environmental Impact Statement (DEIS), were selected after careful consideration and assessment of the potential environmental impacts and evaluation of agency and public comments. After consideration of all agency and public comments received on the Revised Draft Environmental Impact Statement (RDEIS) of 2006 and the original DEIS of 2004, coordination with landowners, as well as updated environmental data, the Grand Parkway Association, in coordination with department and Federal Highway Administration (FHWA), selected a Preferred Alternative Alignment. It was determined after careful review of the RDEIS and DEIS comments that a shift of the Recommended Alternative Alignment shown in the RDEIS in two locations was necessary to create a Preferred Alternative Alignment. These shifts are as follows:

In Reach 7, near Boudreaux Road, where the Recommended Alternative Alignment passed through a portion of the Spring Terrace subdivision, the alignment was shifted approximately 120 feet to the northeast, thereby avoiding four platted home sites.

In the far eastern end of Reach 7, the Recommended Alignment was modified to a route more closely in line with Alternative Alignment A, with an added dip to the south near the border of Reach 8. This adjustment allowed engineers of the roadway to avoid a relocation of the railroad which had been included in the Recommended Alternative Alignment. Relocating the railroad necessitated additional Right-of-Way impacts and would have added a large expense in time, energy, and money. This modification does not increase impacts to any other resource.

The preferred build alternative that has emerged from the study was proposed on the basis of its ability to best facilitate the projects Need and Purpose while minimizing impacts to the natural, physical, and social environments. The Preferred Build Alternative Alignment is approximately 12.01 miles long. It begins at SH 249 approximately 0.2 miles south of Boudreaux Road, the alignment travels east approximately 1.8 miles, then heads northeast approximately 2.5 miles, running parallel and adjacent to Boudreaux Road. After crossing FM 2920, the Preferred Alternative Alignment travels east 1.2 miles before veering northeast for 0.8 miles and crossing Boudreaux Road and Kuykendahl Road just north of the Spring Terrace subdivision. Continuing northeast, crossing Northcrest Drive, and then turning eastward to a crossing of Gosling Road and on to a joint crossing of Rothwood Drive and the Union Pacific Railroad (UPRR). The alignment turns east-southeast parallel to and north of the UPRR tracks until it turns northeast to connect to IH 45, approximately one mile south of the IH 45/Hardy Toll Road interchange. The Preferred Alternative Alignment for Segment F-2 would require the acquisition of new right of way (630 acres), the adjustment of utility lines, and the filling of aquatic resources including jurisdictional wetlands (58.89 acres). The Preferred Alignment as presented in the FEIS would displace 120 residential properties and nine commercial properties. No archeological sites, historic properties, or endangered species are expected to be affected.

Copies of the FEIS may be viewed at the Grand Parkway Association website, www.grandpky.com; at the offices of the Grand Parkway Association or the Texas Department of Transportation's Houston District (addresses previously mentioned); at the Houston Public Library, Central Branch, 500 McKinney, Houston, Texas; at the Harris County Public Library, Tomball Branch, 30555 Tomball Parkway, Tomball, Texas; at the Harris County Public Library, Northwest Branch, 11355 Regency Green Drive, Cypress, Texas; and at the Harris County Public Library, Barbara Bush Branch, 6817 Cypresswood Drive, Spring, Texas. Copies of the FEIS and other information about the project may be obtained at the Grand Parkway Association office or the department's Houston District Office. For further information, please contact David Gornet, P.E. at (713) 965-0871 or Pat Henry, P.E. at (713) 802-5241.

TRD-200804918
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 10, 2008

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).